

**In the Consistory Court of the Diocese of Worcester:**

**Archdeaconry of Dudley**

**Alvechurch - Church of St. Laurence**

**Faculty petition 16-09**

**Proposed exhumation of the cremated remains of J T Smith**

## **Judgment**

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### **Background**

1. This judgment concerns a petition dated 26<sup>th</sup> January 2016 by Nigel Smith, Martin Smith and Jonathan Smith seeking the authority of the Court for the exhumation of the cremated remains of the Petitioners' father, the late John Trevor Smith. There are no other surviving relatives.
2. It is proposed, in the petition, that their father's remains be exhumed from grave space at Section D, Row 4 (which, for the avoidance of doubt, is located between Rainbow and Wolley) in the churchyard at St. Laurence, Alvechurch and that they be re-interred in the grave space at Section G, Row 2 (for the avoidance of doubt, located between Notley and Peel) in the same churchyard. It is also proposed that the existing grave and headstone be removed.
3. Mr John Trevor Smith died on 27<sup>th</sup> July 2003 and his ashes were interred on 11<sup>th</sup> July 2004 in the cremated remains grave space at Section D, Row 4.
4. Mrs Pamela Smith, the wife of John Trevor Smith and the mother of the Petitioners, died in 2015 and her remains were buried in the grave space proposed for the re-interment of her husband's ashes (Section G, Row 2).
5. The Petitioners' parents had been married for 47 years when their father died.

### **Procedure**

6. This is an unopposed petition without any party opponent. Procedurally, I may grant a faculty, on the production of any relevant evidence, without further proceedings or

hearing, pursuant to rule 10.6(1)(a) and (2) of the Faculty Jurisdiction Rules 2015. Since a decision on a petition does not give rise to a matter of law it being an exercise of discretion<sup>1</sup> and does not give rise to a question of doctrine, ritual or ceremonial<sup>2</sup>; and does not affect the legal rights of any person or body<sup>3</sup>, there appears to be no obligation under rule 7.3(1) for me to give any summary form of reasons for granting a faculty. Nevertheless, as the majority of Chancellors and Deputy Chancellors chose to give their reasons, I propose to do likewise.

### **The guidelines that apply to applications for exhumation**

7. The guidelines for exhumation petitions set out by the Court of Arches in Re Blagdon Cemetery have been helpfully summarised in Re Mandy Ramshaw [2016] ECC Oxf 1<sup>4</sup> by McGregor Ch.:

"8. In *Blagdon* the Court of Arches held that there was a presumption that Christian burial was permanent, that remains should not be portable, and that a faculty for exhumation would only exceptionally be granted. According to the Court of Arches, "Exceptional means 'forming an exception' (Concise Oxford Dictionary, 8th ed (1990)) and guidelines can assist in identifying various categories of exception. Whether the facts in a particular case warrant a finding that the case is to be treated as an exception is for the chancellor to determine on the balance of probabilities." It is for a 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 norm that Christian burial is final.

9. The guidelines provided by the Court of Arches can be summarised as follows:

- a. Advancing years, deteriorating health and moving to a new area are not in themselves adequate reasons for permitting exhumation. Any medical reasons relied upon by a petitioner have to be very powerful indeed to create an exception to the norm of permanence, for example, serious psychiatric or psychological problems where medical evidence demonstrates a link between that medical condition and the question of location of the grave of a deceased person to whom the petitioner had a special attachment.
- b. The passage of a substantial period of time since burial will not in itself be fatal to a petition, although it might be potentially relevant in assessing the genuineness of the petitioner's case.

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<sup>1</sup> In Re Blagdon Cemetery [2002] Fam 299 at paras.34-35 and 41

<sup>2</sup> *ibid* para 22

<sup>3</sup> *ibid* paras 19 and 41

<sup>4</sup> The same summary also appears in Re Katherine Tollis [2016] ECC Oxf 2, McGregor Ch.

- c. Since double and triple graves in which the remains of members of the same family could be buried together were to be encouraged, the bringing together of family members' remains in a single grave can provide special reasons for permitting exhumation despite the lapse of a long period of time since burial. But where no burial had yet occurred in a family grave clear evidence as to the existence of a legal right to such a grave would be required to justify exhumation.
  - d. Although mistake as to the location of the grave or, in certain circumstances, as to the significance of burial in consecrated ground could be a good and proper reason, mere change of mind as to the place of burial by those responsible for the interment could not.
  - e. Although the views of close relatives were a very significant factor, the amount of local support for the petition would normally be irrelevant.
  - f. In view of the desirability of securing equality of treatment between petitioners so far as circumstances permitted, the court has to take into account 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. In the case of Re Mandy Ramshaw, only (c) 'family grave' was identified. No exceptional circumstance was found in the case of Re Katherine Tollis.
9. The passage quoted above was adopted by Ellis QC Dep.Ch. in Re Mortlake Cemetery, Southwark [2016] ECC Swk 6 with the additional comment that in Re Blagdon Cemetery it was held:

"The variety of wording which has been used in judgments demonstrates 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."

Ellis QC Ch. then observes that:

"22. Whilst the guidance in Blagdon on particular arguments is valuable, there is no suggestion that the scope of possible exceptions is limited to these categories. The facts of the current Petition do not fall

exactly within all or any of the circumstances specifically addressed in Blagdon."

In each of these cases, one guideline or exceptional circumstance only was required to be satisfied; in the latter case a category analogous to but not the same as one of the Re Blagdon Cemetery guidelines was sufficient.

10. In Re St. Mark, Fairfield, Worcester 2012, I drew attention to the decision In Re Plumstead Cemetery, Southwark [2012] in which Petchey Ch. suggested that more than one guideline or exceptional circumstance should be satisfied before exhumation based upon creation of a family grave can be authorised.
11. In Re St Peter Gunton, Norwich [2016], Arlow Ch. has applied Re Plumstead Cemetery saying that to establish an exceptional circumstance justifying exhumation, successfully, more than family grave must be shown and that, for example, mistake must also be found:

"12 .... The creation or use of a family grave will not, alone, amount to a special reason justifying an exception to the presumption of permanence, but it may be a factor to be weighed by the Chancellor in deciding whether such special reasons exist (see the decision of Chancellor Petchey in Re Plumstead Cemetery ...."

12. I have updated the Table that I included in Re St Mark, Fairfield judgment and found no other judgment expressing support for a requirement that more than one of the in Re Blagdon Cemetery guidelines or special circumstance need be found to justify a faculty authorising exhumation:

Category (a): Transfer to existing grave or adjacent graves of more than one family member

In re St James Churchyard, Hampton Hill 1982 [para. 45]	- granted
In re Arthur Mallinder, deceased 2006 [para. 25]	- refused
In re St Mary's Churchyard, Goring by Sea 2009 [para. 42]	- granted
In re Frederick Randall, deceased 2011 [para. 34]	- granted
In re St Mary Trentham, Lichfield [2012]	- granted
In re St Mark Fairfield, Worcester [2012]	
(either family grave or mistake each sufficient alone)	- granted
In re Astwood Cemetery, Worcester [2014]	- granted
In re St Peter Gunton, Norwich [2015]	- refused
In re Holy Cross Cemetery Wallsend, Newcastle [2016]	- granted
In re St Peter Gunton, Norwich [2016] (applying Plumstead :	
family grave required mistake as well)	- granted
In re West Norwood Cemetery, Southwark [2016]	- granted
In re St Saviour Smallthorne, Lichfield [2016] (and mistake)-	granted

Category (b): Transfer to the existing grave of a single family member

In re Joanne Lyndsey Martin 2004 [para. 21]	- refused
In re St Andrew (Old Church), Hove 2005 [para. 23]	- refused*
In re Harold Greaves, deceased 2010 [para. 42]	- refused*
In re Allen Godfrey Rodley, deceased 2011 [para. 42]	- refused*
In re St Bartholomew Horley, Southwark [2010]	- granted
In re Holy Trinity Low Moor, Bradford [2010]	- refused**
In re Scholemoor Cemetery, Bradford [2011]	- refused**
In re St Margaret Thornbury, Bradford [2011]	- granted
In re Graham George Marston, deceased 2012 [para.36]	- granted
In re Southern Cemetery, Manchester [2012] (elsewhere)	- refused
In re St Margaret Horsmonden, Rochester [2013]	- refused**
In re McGarry, Manchester [2013] (elsewhere) [para 25-26]	- granted
In re St Edward, King & Confessor New Addington [2013]	- granted
In re St Helen Edlington, Lincoln [2014] (elsewhere)	- refused
In re Mortlake Cemetery, Southwark [2016] (applying Ramshaw/Blagdon guidelines but not restricted to them)	- granted
In the matter of Cyril Jones, Orford, Liverpool [2016]	- granted
In re Mary Wright, Preston Cemetery, Newcastle [2016]	- refused
In re St. Peter Hednesford, Lichfield [2016]	- granted

Category (c): Transfer to a newly created family grave

In re Blagdon Cemetery 2002 [paras. 9-20]	- granted
In re Hither Green Cemetery 2008 [para. 28]	- granted
In re Maurice William Egerton 2008 [para. 32]	- granted
In re St John the Baptist, Dudley 2009 [para. 33]	- granted
In re Skidbrooke Burial Ground, Lincoln [2012] [para.9]	- granted
In re Doreen Oxley, deceased 2012 [para. 42]	- refused*
In re Plumstead Cemetery, Southwark [2012] [paras 51/54]	- granted
In re Bourne Abbey, Lincoln 2012	- granted
In re St Paul Fazeley. Lichfield [2016]	- granted
In re Mandy Ramshaw, Oxford [2016] (family grave alone)	- granted
In re St Nicholas Kenilworth, Coventry [2016]	- granted

Category (d): Transfer from existing family grave to proposed new family grave

In re Boston Cemetery, Lincoln 2012	- refused
In re St John the Baptist, Hungerton, Leicester [2012]	- refused
In re Bowling Green Cemetery, Bradford 2013	- granted
In re Holy Trinity Dawley, Lichfield 2013	- refused
In re Tunbridge Wells Cemetery, Rochester [2016]	- granted*
In re Astwood Cemetery, Worcester [2016]	- granted

Category (e) Transfer from an existing family grave to another family grave elsewhere

In re St Peter Foston, Lincoln [2012]	- refused
In re Coventry Road Cemetery, Bedworth [2016]	- granted

13. In the decisions marked with a single asterisk, there was no express reference to justification as a 'family grave'. In the decisions marked with a double asterisk the Chancellors found that no exceptional circumstances arose (i.e. that no question of a family grave arose).
14. There are judgments refusing faculties where the petitioners merely propose moving remains to a new and more convenient location for the survivors to visit. These may be categorised as 'portability' decisions, most of which are refused. There are also judgments which appear to include international 'portability', most of which succeed on their particular facts. Neither category is included in the Table above.
15. My understanding of Re Blagdon Cemetery paras. 36 (vi) and 38 is that transfer of the remains of a family member to an existing and established family grave or graves is, without more, capable of being an exception and of constituting a special circumstance sufficient to outweigh the presumption of permanence of burial. A credible explanation will be required for any lapse of time but that is not a determinative factor.

#### **The Petitioners' evidence**

16. John Trevor Smith had always expressed a dislike to the idea that, after death, his remains should be buried before or instead of their having been cremated. This stemmed partly from his knowledge of the terrible experiences his father had encountered in France and in Flanders during the First World War; and partly from his own experiences as an infantryman in northern Europe during the Second World War. Both his parents had been cremated and his own wish to be cremated followed from these experiences and examples.
17. On the other hand, although the Petitioners' parents had originally decided to be cremated their mother had hated the idea of cremation. She had an 'old-fashioned' view of what was properly Christian. Her wish was to be buried at Alvechurch as her parents and grandparents are.
18. The remains of John Trevor Smith had been cremated as he had wished in 2003.
19. Following the cremation, the Petitioners' mother received a number of communications from the undertakers regarding the collection of her husband's ashes. The undertakers informed her that they were unable to store the ashes indefinitely. The Petitioners say that their mother had assumed that the undertakers

could hold and store the ashes indefinitely. She had assumed that they would be held by the undertakers until she died. It was her intention that her husband's ashes could then be interred together with the burial of her own remains in a single grave.

20. Mrs Smith, for obvious reasons, did not wish to collect and store the ashes herself.
21. In the event, during July 2004, Mrs Smith had her husband's ashes interred at Alvechurch. The Petitioners state that she assumed this to be a temporary measure and that she intended them to be re-interred with her own remains on her burial. The Petitioners state that it never occurred to them or to their mother that there would be any issue about this proposed course of action. The Petitioners say that they

"are sure that at this time (in 2004), nobody from the undertakers or the church ever mentioned it could be a problem. If she had known of the present difficulties Mum would certainly have made other arrangements for the storage of the ashes."

That is, other arrangements for the storage of her husband's ashes, until her own burial

22. The Petitioners categorise the current circumstances as having been based on mistaken facts and ignorance and seek to re-unite their parent's remains in death, as they had wished in life. They emphasise that there had been no change of mind.
23. Finally, the Petitioners refer to the additional benefit of freeing up a cremation plot in the churchyard.

### **Exceptions to the presumption that burial is permanent**

24. *Family grave*

I find that the transfer of ashes from one plot to the burial plot of another member of the same family, in this case uniting of the remains of husband and wife, within the same churchyard, is the creation of a family grave.

It has the added environmental advantage of freeing up a plot for future use. Such economical use of burial plots is to be encouraged.

I accept the evidence of the Petitioners explaining how their parents came to be buried apart. These special circumstances have been explained in the evidence set out above.

25. *Lapse of time*

Lapse of time might be a reason for not granting permission to exhume in particular circumstances<sup>5</sup>. However, in this case, there has been no significant lapse of time to set against the exceptional circumstances arising in this case. Once Mr Smith's ashes had been interred, albeit reluctantly, neither the Petitioners' mother nor the Petitioners had any occasion to take any further steps until his wife died. Thereupon, the Petitioners took immediate steps to rectify the position. The Petitioners have acted as swiftly as could reasonably be expected.

26. *Local support*

Although not determinative of whether the evidence reveals special circumstances which justify the making of an exception from the norm of the finality of Christian burial, I record that there is support from the PCC and Priest in charge and no opposition to the proposal. I also note that in Blagdon, there was recognition that the views of close relatives are "very significant"<sup>6</sup>

27. *Mistake*

The facts reveal that Mrs Smith was mistaken to inter the cremated remains of her husband when she did. She was mistaken in expecting that her husband's ashes could remain with the undertaker, or indeed with herself, for the length of time that she might outlive him, without any requirement that they be buried. When confronted with the need to do something she does not appear to have had any advice as to the options available or consequences of the various actions she was advised to take. This is particularly difficult when cremation of one partner precedes burial of the remains of the other partner some years later.

I accept the evidence that neither Mrs Smith nor the Petitioners have at any stage changed their mind as to the eventual outcome sought for Mr Smith's ashes.

If it were necessary for me to do so I would find that this exhumation is justified by the exceptional circumstances surrounding the mistake made in burying Mr Smith's ashes and in the absence of clear advice at the time.

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<sup>5</sup> In Re Blagdon Cemetery at page 308C, para.36(ii)

<sup>6</sup> In Re Alan Brown deceased 2008; In Re Blagdon Cemetery at page 309E, para.36(iv)



28. *Precedent*

I have sought to discern any precedent that might be derived from the decisions of Consistory Courts since the Court of Arches decision in Re Blagdon Cemetery. Insofar as any precedent is discernible, I find that allowing this Petition would set no different or inappropriate precedent and that it would be consistent with the guidelines in that judgment.

**Order**

29. In the exercise of my discretion I direct that a faculty should issue for the exhumation of the cremated remains of Mr John Trevor Smith from Section D Row 4 and for their re-interment in the grave of his wife Mrs Pamela Smith at Section G, Row 2, both in the churchyard of St .Laurence, Alvechurch.
29. Thomas Brothers, Red Lion Street, Alvechurch, Worcestershire B48 7LF will make the arrangements for the exhumation and the re-interment. They will also remove the stone and reinstate the space at Section D, Row 4 for future use. The works should be commenced within 14 days of the grant of a Faculty and should be completed within a single day, or within such other periods or by such undertakers as may be agreed in writing with the Registrar.

Robert Fookes

Deputy Chancellor

17th August 2016