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Faculty – Churchyard – Petition for interment of father’s ashes in son’s existing grave which also contains the cremated remains of his mother – Court’s jurisdiction – Role of minister – Faculty granted subject to conditions

Petition No: 7 of 2021

**IN THE CONSISTORY COURT OF
THE DIOCESE OF BLACKBURN**

Date: Sunday, 28 November 2021

Before:

THE WORSHIPFUL DAVID HODGE QC, CHANCELLOR

In the matter of:

JOSEPH HENRY MATHER, Deceased

Between:

Susan McNamara

Petitioner

- and -

Ann Mather

Party Opponent

Determined on the papers and without a hearing

The following cases are referred to in the Judgment:

De Romana v Roberts [1906] P 332

Re Blidworth Churchyard [2021] ECC S & N 2, (2021) 23 Ecc LJ 372

Re Ezekiel’s Settlement Trusts [1942] Ch 230

Re Mitcham Road Cemetery, Croydon [2021] ECC Swk 2
Re St Andrew, Cubley [2020] ECC Der 2, (2020) 22 Ecc LJ 195
Re St Mary, Beenham Valence [2021] ECC Oxf 4
Re St Mary, Polstead [2017] ECC SEI 2, (2018) 20 Ecc LJ 111
Re St Nicholas, Baddesley Ensor [1983] Fam 1
Re West Pennard Churchyard [1992] 1 WLR 32

JUDGMENT

Introduction and background

1. This case should serve as a warning to ministers and parochial church councils about the potential pitfalls of seeking to operate an informal system of grave reservations outside the lawful confines of the faculty system. In the present case, it has resulted in some 18 months of acrimony within the deceased's wider family and has led to this petition, dated 22 January 2021, by which Mrs Susan McNamara (who lives in Surrey) seeks a faculty authorising the interment of the ashes of her late father, Mr Joseph Henry Mather (**'Joseph'**), within a burial plot in the churchyard designated NGC 101. The adjoining burial plot, designated NGC 102, is presently vacant.

2. St Andrew's is a traditional parish church situated in the heart of the village of Longton in Lancashire, to the south-west of the City of Preston. The current (2009) edition of the volume of *Pevsner's Buildings of England* for *Lancashire: North* (ed. by Clare Hartwell and Nikolaus Pevsner) describes Longton as "a straggling sort of place, on flatlands near the coast". Although the church was built in 1887, to a design by J. E. K. and J. P. Cutts, and has been praised for its proportions and its details, it is not a listed building. The vicar for the past 27 years, the Reverend Andrew Parkinson, retired during the currency of this dispute; and the church is in a period of interregnum until a new vicar is appointed.

3. The genesis of the present dispute goes back almost 40 years. The late David Mather (**'David'**) was killed in a tragic fire in Glasgow on 16 November 1982, aged only 26. David was living in the parish of Longton at the time of his death and so he had a right of burial in the churchyard of the parish church of St Andrew's. His remains were buried in NGC 101 on 26 November 1982. He left a widow, Mrs Ann Mather (**'Ann'**), whom he had married in 1978 when he was aged 22 and she was 20. At the time, the family believed – wrongly, as they now acknowledge – that a second, adjoining grave space (NGC 102) had been reserved for the interment of a member or members of the family although there is a bitter dispute between the parties as to the intended beneficiary or beneficiaries of this (supposed) grave space reservation.

4. Sadly, 19 years to the day after David's death, his mother, Mrs Rita Mather (**'Rita'**), died, on 16 November 2001. She was cremated. By then David's widow, Ann, was in a permanent and loving relationship with her present partner, Mr Tony Ivanovic (**'Tony'**). Rita's widower, Joseph, wished her cremated remains to be laid to rest in David's grave but initially Ann was opposed to this. She later changed her mind, and Rita's cremated remains were interred in David's grave. Again, there is a dispute between the parties as to how this change of mind came about and as to the nature of the parties' intentions for the future disposition of the remains of Joseph and Ann when their times should come. In addition to the pre-existing, heart-shaped memorial to David (which would not be permitted under the current (2014) Churchyard Regulations for the Diocese of Blackburn: see paragraph 3.6.3), Joseph and his family erected a second, book-shaped

memorial to Rita, with space to accommodate a second inscription. At an early stage of the present dispute, it appeared that Ann might be seeking to have this second memorial removed (the Churchyard Regulations making no provision for a second memorial on a single grave space); but there is no petition before the court seeking its removal. Once a memorial has been installed (even if it is unlawful under ecclesiastical law), it cannot be removed except by a faculty granted for that purpose; and more than six years would appear to have elapsed since the second memorial was erected, so the time for making any restoration order would appear to have elapsed: see section 72 (5) of the Ecclesiastical Jurisdiction and Care of Churches Measure 2018 (**‘the 2018 Measure’**). (I should record that I have looked at the church web-site but I cannot see that any regulations have ever been made which are specific to this particular churchyard.)

5. Sadly, Joseph fell victim to coronavirus, and he passed away on 16 April 2020, aged 90. He had lived in the parish for many years, only leaving to move in to a nursing home in Lytham in 2019. In 2020 he had been admitted to the Blackpool Royal Victoria Hospital suffering from pneumonia and sepsis. He seemed to recover, and he was transferred to another nursing home in Ingol; but shortly afterwards he suffered a relapse and was admitted to the Royal Preston Hospital. From there he was transferred to the Chorley and South Ribble Hospital where he was then diagnosed with Covid 19. On 16 April, at the height of the first wave of the pandemic, he sadly died. He was cremated; and it is the wish of the petitioner, who is one of his three daughters, that his ashes should be laid to rest with those of his late wife, Rita, in the grave in which the body of his son, David, had been laid to rest in 1982. In the written reasons provided in support of her petition, Mrs McNamara states that:

“My late father lived for many years in the parish, only leaving to go into a nursing home in 2019. I believe therefore that he has a right to be buried in the churchyard at St Andrew’s.”

However, it would appear that Joseph had ceased to reside in the parish before his death; and since he did not die within the parish, and there is no evidence that he was on the church’s electoral roll, for the reasons explained below he would appear to have had no right of burial within the parish. Had this issue proved crucial to my determination, I would have sought further evidence on it (such as whether Joseph had retained his home after he had moved into the nursing home or whether it had been sold). Fortunately, I do not consider that this is necessary in order to determine this petition.

6. On receiving the petition, I gave directions: (1) pursuant to rule 6.6 of the Faculty Jurisdiction Rules 2015 (as amended) (**‘the FJR’**), that public notices were to be displayed on a notice board outside the church building and in the churchyard where they could be read by the public; and (2) pursuant to FJR 9.1, that special notice of the petition was to be given to the minister, to the PCC and to Ann, by serving copies of the petition (with the supporting reasons) and the public notice upon them, together with details of how any of them might object to the petition should they wish to do so. These directions were duly complied with. The only objection to the petition was received from Ann (who lives in New Longton, a little to the east of Longton) in the form of a letter dated 16 February attaching her written reasons for objecting to the petition. The Registry duly followed the procedure prescribed in FJR 10.3. This resulted in Ann instructing a specialist ecclesiastical solicitor (Mrs Donna Myers of HLF Berry). Attempts were made to resolve the matter by agreement but, sadly, negotiations came to nothing and, by letter dated 13 May 2021, Ann’s solicitors served particulars of objection to the faculty petition (in Form 5) and a witness statement from Ann dated 13 May 2021 (verified by a statement of

truth) together with several exhibits. Ann thereby became the party opponent to the petition. Ann's stated grounds of objection (as amplified in her witness statement) are that: (1) Her consent to the interment of the cremated remains of her late mother-in-law, Rita, in grave space number NGC 101 was given under the mistaken belief that this was not a double-depth grave plot so that she could not be buried in that plot with her late husband when her time should come; and (2) Any further interment of cremated remains was likely to prevent Ann's own future burial in that grave plot.

7. As directed by the court, the petitioner served her reply (in Form 6) and an accompanying statement and documentation on 2 June 2021. She confirmed that she wished my judgment to be delivered after the receipt of written representations. Upon receipt of these documents, I directed that: (1) Within 14 days Mrs McNamara was to verify the statement attached to her Form 6 with a statement of truth (in the same way as Ann had done with her statement). (2) Within 14 days the parties were to serve upon the Registry, and on each other, any written representations on which they intended to rely. (3) Within 21 days the parties were to notify the Registry and each other whether they were content for the court to proceed to determine this petition by way of written representations. (4) Either party had permission to apply for any further directions within 28 days. These directions were sent out by the Registry on 14 June 2021.

8. Following the issue of these directions, Ann's solicitor inquired whether any formal statement had been, or would be, requested from the Reverend Andrew Parkinson concerning his dealings with her client and Mrs McNamara. In response to this request, the Registrar communicated with the Reverend Parkinson (who had by then retired as the incumbent at St Andrew's on 6 April 2021, after some 27 years' service to the parish). In response, the Reverend Parkinson reiterated his belief that Ann's consent was required to the interment of her late father-in-law's ashes in grave space NGC 101 as her late husband was the original burial and any further burials in that plot would compromise Ann's wish to be buried with her late husband. Having left the parish, the Reverend Parkinson regarded his part in the matter as closed; and he expressed his objection to the fact that the church had been caught up in the middle of what he viewed as "a family dispute". It is clear that no further information will be forthcoming from this source. However, in an email to Ann dated 24 April 2020, the Reverend Parkinson had earlier confirmed that "... all graves in St Andrew's are for two burials so as long as your husband is the only burial to have taken place in the plot I can guarantee that the space is there for you". In a later email to Ann, dated 8 July 2020, the Reverend Parkinson had written:

"In terms of original paperwork. the Church has no copies from the time of the Revd Tom Thompson, nor did I have your address in any records that I inherited. Indeed the only record was a pencilled entry in a lined notebook that a 'reservation' had been made without saying who had made it and what the circumstances were. I had no record of who the responsible next of kin was or any contact details. Indeed, under my predecessor, if a Funeral was arranged by certain family members, and then subsequent arrangements were made concerning a Grave space, my predecessor may well have assumed that the right of decision had been made over to them. Nowadays a Power of Attorney document would have to be approved by the Courts and produced as evidence of the right to act. The Church of England has to abide by both Canon Law and Common Law in the maintenance of Churchyards and both have changed substantially over the years.

In 2001/2 I was legally obliged with your mother in law to deal only with the next of kin and was assured that all permissions had been granted.

As regards the placing of the casket there is no plan but it would be right against the headstone and a full burial is still perfectly possible in the grave. As regards the large headstone, as I stated, that remains your property and cannot be added to without permission while the 'book' remains the property of the family who paid for it and therefore what is inscribed on it is the next of kin's responsibility. The Church has the sole responsibility of ensuring that the headstones in the Graveyard are safe - if not, they have to be laid down or shored up with a dangerous structure warning attached to them.

From your account, it would appear that it was your late father in law who entered the 'agreement' with my predecessor about the adjoining Grave ...”

In an undated letter to Ann, the Reverend Parkinson also wrote:

“It is clear that, in a time when regulations were not enforced as much as they are today, where we have a three-yearly inspection of the Churchyard by the Archdeacon, my predecessors entered into irregular arrangements with individual families which today have no legal standing. That being said, in the 1990s, soon after my arrival, the PCC took two decisions. First, that we would accept no more Faculty applications for the reservation of Grave spaces, believing that the fairest way is to let nature take its course, and second, that, where there was the relevant paperwork, and a family had entered into an arrangement in good faith, the PCC would do everything it could to honour those agreements, although not legally bound to do so.

There has been no written contact with the Diocesan Registry regarding the above Grave spaces but a phone enquiry, and examination of papers in the Church Safe, where legally all Faculty documents have to be kept, revealed that historically no Faculty had been applied for, or granted, regarding NGC 102. Within the family there should have been a letter from my predecessor, Fr Tom Thompson, regarding the agreement made. The only mention we have in all the Church papers is that a Grave space, NGC 102 was 'reserved' for the Mather family ...

There is a lack of clarity as to who in the family actually talked with Fr Tom regarding the Grave space NGC 102 and as to what the agreement was. However, the PCC will honour the agreement and, as I wrote to you in 2012, the space in the Graveyard will not be used until such time as it is required.

Grave space NGC 101 is not in dispute since in 1982 the Burial of Mr David Mather took place.

In 2001, the Cremated Remains of Mrs Rita Mather were interred in NGC 101, after assent was given. It is agreed by all that assent was given, no objections were raised and the Church then acted in good faith. What is now disputed is the way that that assent was obtained and given.

We do not keep a record of who actually digs in the plots in the Graveyard. We do not employ a Gravedigger and with the Interring of Ashes in a Grave we usually ask an undertaker who is overseeing another Burial around that time to arrange a Gravedigger for us.

Neither do we keep measurements of individual Graves. What happens when a burial is requested is that the Gravedigger uses a process called ‘rodding’ to ascertain the depth of any Burials already in the plot.”

9. In compliance with my directions, on 25 June 2021 Mrs McNamara served a slightly revised form of the statement that had accompanied her reply, and she attached further documentation. This included statements from each of her two sisters, Mrs Karen Whittle and Mrs Linda Horstkotter, in support of Mrs McNamara’s petition. In her covering letter, Mrs McNamara reiterated her wish for my judgment to be delivered after the receipt of written representations. On 29 June, the Registry received two further documents on behalf of Mrs McNamara, including a witness statement from her sister, Mrs Horstkotter, dated 28 June 2021.

10. On 2 July 2021, the Registry received a second witness statement from Ann together with various further exhibited documents, including a statement from Tony, Ann’s partner for over 30 years.

11. By email dated 15 September 2021, Ann’s solicitor confirmed that her client had decided to consent to this matter being determined by the Chancellor on the basis of written representations. Since both parties agree to this course, I am satisfied that it is expedient to determine this petition on consideration of the parties’ written representations.

12. I should record that: (1) seldom, if ever, have I received so much documentation in support of a private faculty petition; and (2) the parties have made numerous attempts to settle this dispute, in the early stages through the medium of the then incumbent, then through the mediation of the Assistant Archdeacon of Blackburn, and latterly with the assistance of Mrs Myers. Before serving Ann’s reply, her solicitor had pointed out that “... by continuing to engage in what, thus far, has been a constructive exchange of views, an agreement could be reached and thereby avoid any unnecessary costs and/or publicity”; but Mrs McNamara’s response was that “As previously stated, I will now leave the matter for the Chancellor to decide”: see the exchange of emails dated 4 May 2021 within Exhibit AHM 4 to Ann’s reply. I have allowed the parties considerable latitude in terms of extending time limits and delaying work on this judgment in the hope of facilitating a settlement, and, as a result, the parties have succeeded in achieving a great deal of common ground; but a full and final settlement of their differences has sadly eluded them.

Legal considerations

13. The law relating to those who may be buried in a churchyard derives partly from the common law and partly from statute, now section 88 of the 2018 Measure (consolidating earlier provisions from Measures in 1976 and 1992). As Chancellor Ockelton (in the Diocese of Southwell and Nottingham) explained in *Re Blidworth Churchyard* [2021] ECC S & N 2, (2021) 23 Ecc LJ 372 (at paragraphs 10 to 14):

“10 The common-law right to be buried in the churchyard of the parish church extends to those who die in the parish and those who at the time of their death were resident in the parish. These rights are irrespective of the deceased’s faith or membership of any worshipping community. The right was enlarged by the 1976 Measure to include also those who at the time of their death were on the parish electoral roll (that is to say the church’s electoral roll, not the register of electors compiled under the Representation of the People Acts): see now s 88(1) of the 2018 Measure.

11 The bodies of persons not falling within any of these categories may be buried in the churchyard if (but only if) the ‘minister’ gives his consent. This common-law rule, originally part of the rights of the incumbent as freeholder, is now found in s 88(4) of the 2018 Measure, and by subsection (5) the minister is required to take into account any guidance issued by the Parochial Church Council. Subsection (7) defines ‘minister’ for these purposes as (a) the incumbent of the benefice; (b) during a vacancy, the priest-in-charge or licensed curate; (c) failing which, the rural dean.

12 The permission of the incumbent does not create a right. It may be reviewed if there is opposition on the part of those having the right of burial. The incumbent’s refusal of permission is not reviewable, unless the petitioner can bring a claim within the ambit of equitable estoppel by showing that he has acted to his detriment on a promise made by the incumbent or one of the incumbent’s predecessors. These propositions are derived from the judgment of Chancellor Aglionby, who reviewed the scant previous authorities in *Re St Nicholas, Baddesley Ensor* [1983] Fam 1. In short, the absence of the incumbent’s consent operates as a veto, as Chancellor Newsom QC put it in *Re West Pennard Churchyard* [1992] 1 WLR 32, 34, deriving that principle from the words of Dr Tristram KC Ch in *De Romana v Roberts* [1906] P 332, 336.

13 There are some other small classes of people who have the right of burial. Only one needs mention here. The reservation of a gravespace by faculty gives the exclusive right of burial while the faculty is current to those in whose favour the faculty is issued.

14 It is important to add that the right of burial does not include the right to be buried in any particular grave or in any particular place in the churchyard. The only way that a particular gravespace can be secured is by reservation of it, which requires a faculty. In every other case the place of burial is determined by the incumbent.”

As Chancellor Ockelton explained (at paragraph 40):

“Reservation of a gravespace by faculty gives the right of burial in that space for those named in the faculty ...”

I should add that by section 88 (2) of the 2018 Measure, a person who has a right of burial in the churchyard, or other burial ground, of a parish also has the right to have their cremated remains buried there.

14. This petition seeks a faculty authorising the interment of the ashes of the petitioner’s late father in the existing grave of his son, which also contains the cremated remains of his mother. Although the son’s widow is the party opponent, there is no cross-petition seeking any reservation or directions in relation to her future remains when her time comes. This dispute first surfaced during the time of my predecessor as Chancellor, John Bullimore. He raised the question of what powers the Consistory Court has in a case of this nature; and he helpfully drew the Registry’s attention to his then recent decision (in the Diocese of Derby) in *Re St Andrew, Cubley* [2020] ECC Der 2, (2020) 22 Ecc LJ 195. That was an exhumation case. The body of a woman had been buried in the grave of her late brother. The brother's widow and his son had not been consulted by the woman's sons, or by the funeral director or the parish priest. Upon discovering what had happened, the son applied for a faculty for exhumation, as he felt that he and his mother should have been consulted, and that he would then have objected to the interment in his father's grave had he known about it. The Chancellor took the view that the

woman's sons had kept quiet about the existence of the brother's son and his widow in order to have their mother buried in an existing grave where she had no legal right to be buried. However, the Chancellor refused to grant a faculty for exhumation. Although it was unusual, and very regrettable, that the petitioner and his mother had not been consulted, the Chancellor concluded (at paragraph 72) that the petitioner had "... not established any basis sufficient in law based on any property right analogous to a reservation, or otherwise, to support his petition for exhumation".

15. In the course of a lengthy and detailed judgment, Chancellor Bullimore considered the law relating to burial in a churchyard at paragraphs 46 and following. Paragraphs 50 to 53 read:

“50 ... a churchyard, and the grave spaces in it that have been used, as well as any still unused, are vested in, or in layman's terms, are owned by the church, usually the parish priest. The fact of a burial does not in some way create a legal interest in the grave space for the family of the deceased person, either 'ownership' or a lease or something of that kind. Any fees or monies being paid to the church at the time of the funeral (probably via the funeral director), are in respect of the funeral service, and are not a purchase or down payment in respect of some property right in the grave plot. (Arrangements in regard to local authority cemeteries are made on an entirely different basis). The protection afforded to the body or cremated remains is not based on 'ownership' or an interest in land vested in surviving family members, but stems from the church's strong view that its role and responsibility is to safeguard any human remains buried in the churchyard as their final resting place, so an exhumation has to be based on exceptional circumstances, and the general law that renders interference with human remains buried there unlawful, and a criminal offence.

51 The site of future burials of anyone, even those with a right of burial in the churchyard, are to be determined by the church, (but see paragraph 52), normally by the parish priest, and not by family members. That is not to say that in practice it is simply an arbitrary decision. Usually a new grave is opened in the next available space in the row currently in use. Alternatively, the family ask for, and expect, that, for example, the burial of a husband will be with his deceased wife, and so on, and everyone will proceed on that basis.

52 The only exception to the priest having authority to direct where the burial is to be is where there has been a reservation of a particular grave space by a faculty granted by the Chancellor, at the request of one or more individuals, until a burial of one of them is required. Where that has been done, then generally the Consistory (church) Court will order the exhumation of any other person whose remains have been interred there, through some mistake or error. The reservation places those in whose favour the reservation had been granted in the position of quasi owners, or at least as having an exclusive interest in that plot in the churchyard, that will be recognised and enforced ...

53 There are occasionally family disputes about aspects of a proposed burial, and in that event, doubtless the parish priest will seek for a solution acceptable to all, and try to avoid prolonging, or even aggravating, an already difficult situation. If no compromise is possible, the priest will have to decide whether to refuse a burial until the dispute about it is resolved, not necessarily by him or her, but in the last resort by the Chancellor so far as possible, in requiring a petition for a faculty to be presented by an interested party. (I say

more about this below). But the clergy can only take steps to do so, if aware of the underlying difficulty or dispute.”

16. At paragraph 57 the Chancellor turned to consider the duty of the clergy, when dealing with a grieving family, to make such enquiries as might have alerted them to the competing interests of other family members as to what was being proposed. He referred to the earlier decision of Chancellor Etherington QC (in the Diocese of St Edmundsbury and Ipswich) in *Re St Mary, Polstead* [2017] ECC SEI 2, (2018) 20 Ecc LJ 111. This concerned a petition to exhume the cremated remains of one daughter (Joyce) from the burial plot of her parents in the churchyard where they had been interred without the consent of the surviving daughter. Chancellor Etherington QC noted that one of the issues to be resolved had been what the clergy should have done in this situation of a family dispute. The relevant next of kin were not just those of the deceased (Joyce) but included those of the deceased grandparents, in whose plot it had been proposed to inter Joyce’s remains. At paragraph 33 of his judgment, Chancellor Etherington QC considered that Joyce’s daughter should have applied for a faculty to permit the interment of her mother’s ashes in her parents’ grave, so that the matter could have been determined by the court in the proper way. Since, in fact, Joyce’s remains had already been interred, the question was whether they should be exhumed. Having regard to the fact that the various objectors had, through no fault of their own, been denied any opportunity to advance their own objections, in his discretion, and after reviewing the authorities, Chancellor Etherington QC granted an order for the exhumation sought. He considered that the clergy had failed to deal with a known objection in a proper way, and had failed to have regard to the known objector’s views on a correct basis.

17. At paragraph 65, Chancellor Bullimore acknowledged that the *Polstead* judgment had at least sought to grapple with the situation where it was known that there was a family dispute over a burial, and with the responsibilities of the clergy in such a difficult situation; but in the preceding four paragraphs of his judgment the Chancellor explained that he was “troubled” by three matters in particular. The third (discussed at paragraph 64) was this:

“... what matters can the Chancellor properly give a ruling on, in this context? Plainly he or she could determine if a deceased has a right of burial in the churchyard, or a right to burial in a particular grave space, as someone being within the scope of an alleged reservation (as was contended in respect of Joyce). But, in my view, the Chancellor could not decide, when a discretionary right of burial was at the heart of the problem (as I think it was probably in Joyce’s case), whether it should be exercised in favour of a deceased, or against, after hearing representations from interested parties. The discretion is vested under section 88 of the 2018 Measure in the parish priest, subject only to general guidance from the PCC as to how the discretion should be exercised. That discretion is not, in my judgment, subject to any ruling or decision by, or appeal to, the Chancellor, convenient as that might appear to be.”

18. I therefore find myself in the situation that in *Polstead* Chancellor Etherington QC considered that a petitioner could apply for a faculty to permit the interment of a relative’s ashes in an existing grave, so that the matter could be determined by the court in the proper way, whilst in *Cubley* Chancellor Bullimore was of the view that, when a discretionary right of burial was at the heart of the problem, a chancellor could not decide whether it should be exercised in favour of, or against, the deceased because the discretion was vested in the parish priest under section 88 of the 2018 Measure, and was not subject to any ruling or decision by, or appeal to,

the Chancellor, however convenient that might appear to be. Neither view is strictly binding upon me because in neither case did the issue arise directly for decision: each petition merely sought the exhumation of human or cremated remains.

19. The 2018 Measure provides little assistance in resolving this difference of judicial opinion. Section 56 of the 2018 Measure provides:

“For the avoidance of doubt and without prejudice to the jurisdiction of consistory courts under this Measure or under any other enactment or any rule of law, it is hereby declared that the jurisdiction of the consistory court of a diocese applies to every parish church in the diocese and every churchyard and article appertaining to it.”

Section 65 of the 2018 Measure recognises that “an **exclusive** right to a burial place” may be granted by the issue of a faculty for a period not exceeding 100 years in total; but the 2018 Measure otherwise contains no express provision conferring power on the consistory court to grant a faculty authorising the interment of human or cremated remains in consecrated ground. Section 88 of the 2018 Measure (headed “Burials in parish burial ground”) provides (by subsections (4) and (5)) that:

“(4) A person who does not have a right of burial in the churchyard or other burial ground of a parish may not be buried there, or have his or her cremated remains buried there, without the consent of the minister of the parish.

(5) In deciding whether to give consent under subsection (4), the minister must have due regard to any general guidance given by the PCC of the parish in question.”

By subsection (7) “minister”, in relation to a parish, means:

“(a) the incumbent of a benefice to which the parish belongs,

(b) if the benefice is vacant, the minister acting as priest in charge of the parish or the curate licensed to the charge of the parish, or

(c) if there is no minister or curate of that description, the rural dean of the deanery in which the parish is situated.”

20. In *Re Blidworth Churchyard* (cited above) Chancellor Ockelton had to determine (by way of test cases) four faculty petitions for the interment of cremated ashes in the existing graves of relatives in a closed churchyard extension. Since the Chancellor was satisfied that all of these interments were permitted by the relevant closure order (as amended), which allowed interments in existing family graves, he determined that all four petitions were unnecessary; and he therefore dismissed the petitions on the basis that it was not for the court to purport to authorise an act which could lawfully take place without a faculty. Moreover, none of the petitions related to a person who had a right of burial, so that each of the proposed burials required the consent of the ‘minister’; and since none of the proposed burials had the consent of the minister, none of them could take place in any event. As I have already related, the judgment contains a detailed, and learned, discussion about churchyards and the right of burial; but (as the subject-matter of the petitions required) the main focus of the judgment is upon the law relating to closed churchyards, and the interment of cremated remains, both generally and in closed churchyards in particular. In relation to open churchyards where the deceased did not have a grave space reserved by faculty, Chancellor Ockelton summarised the law (at paragraph 39) as follows:

- “1. In a churchyard that is open, the burial may take place, without a faculty, of the body or ashes of any person who had a right of burial there.
2. In a churchyard that is open, the burial may take place, without a faculty, of the body or ashes of a person who did not have the right of burial there, but only if the minister, as defined in s 88 (7) of the 2018 Measure, consents.”

Unsurprisingly, given the subject-matter of the petitions, there was no reference in the judgment to the earlier decisions in *Cubley* or *Polstead*. Chancellor Ockelton founded his summary of the law in part upon the earlier judgment in *Baddesley Ensor*, where Chancellor Aglionby had decided that the Consistory Court had no power to review an incumbent's refusal (as required by the statutory predecessor of section 88 of the 2018 Measure) to consent to the burial of a non-parishioner in a parish burial ground (although he also noted that once consent had been given, an incumbent would be estopped from withdrawing it once the consent had been acted upon and the non-parishioner would be prejudiced by its withdrawal).

21. The analysis in the *Blidworth Churchyard* judgment indicates that if a deceased person has no right to be buried in a particular churchyard, and the minister (as defined) does not exercise their discretion under section 88 of the 2018 Measure to consent to their burial, then the interment of that deceased's remains in that churchyard is not permissible. Section 88 of the 2018 Measure confers any necessary power to consent to the burial in the churchyard of someone with no right of burial on “the minister” (as defined). It makes no provision for the minister to delegate this power to anyone else (such as an assistant priest, or the rural dean, or the minister of another church) so that, on ordinary public law principles, such delegation would not be permissible. Likewise, public law authorities have tended to discountenance any suggestion that a discretion which is conferred by statute on a particular decision-maker can lawfully be exercised by the court when something has gone wrong with the decision-maker's exercise of their discretion. On this analysis, the consent of the minister (as defined) is required as a pre-condition to the grant of any faculty permitting the burial in the churchyard of someone who does not enjoy any right of burial there.

22. Does this mean that the Consistory Court for the diocese has no lawful role to play in a case, such as the present, where there is a dispute as to whether human or cremated remains should be interred in a particular burial plot in an open churchyard within the diocese? In my judgment, there are three potential bases upon which the Consistory Court may properly act on a petition which seeks a faculty authorising the interment of human or cremated remains in a particular burial plot within a churchyard over which it has jurisdiction pursuant to section 56 of the 2018 Measure notwithstanding the lack of any consent on the part of the ‘minister’.

23. First, I consider that the Court must have the necessary jurisdiction to determine whether any actual, or proposed, exercise of the minister's discretion is, or would be, reasonable and lawful. If the minister were to withhold their consent to the burial of a person having a right of burial in the churchyard, then I consider that the Court would have the necessary jurisdiction to rule such an exercise of purported discretion to be unlawful. Likewise, in the unlikely situation of a minister withholding, or giving, their consent to an interment on grounds which were irrational or unreasonable (by, for instance, allowing the burial of a non-family member in an occupied burial plot against the wishes of all the members of the family, or refusing to allow a family member to be buried in a burial plot already containing the remains of a member of the same family for no valid reason, and contrary to the wishes of all the members of that family),

then in my judgment the Court would have the necessary power to intervene to correct any resulting abuse of the exercise of the minister's discretion. Similarly, I consider that the Consistory Court would also have the necessary jurisdiction to give effect to an estoppel of the kind recognised in *Baddesley Ensor*.

24. Second, in my judgment it must be open to the minister to surrender their discretion to the Court and invite the Court to exercise it on their behalf (just as the Chancellor gives permission to a minister to authorise the introduction into a churchyard of monuments and ledger stones under the delegated authority conferred by the Churchyard Regulations for the particular diocese). In the law of trusts, it is clearly established that trustees may surrender their discretion to the court and ask it to exercise the discretion for them in a particular matter: see *Snell's Equity* (34th edn), paragraph 29-031. Thus, in *Re Ezekiel's Settlement Trusts* [1942] Ch 230 the Court of Appeal affirmed a decision of Bennett J exercising, on behalf of trustees, the statutory power of compromising claims which the legislature had conferred upon the trustees under section 15 of the Trustee Act 1925. I see no reason why a minister should not be entitled, in a particular case, to surrender their statutory power of consenting to a burial within their churchyard to the Consistory Court having jurisdiction over that churchyard pursuant to section 56 of the 2018 Measure. In a deeply contentious family dispute, with feelings running high on opposite sides, such a surrender might not only be convenient, but also highly beneficial to the well-being of the parish, by avoiding any appearance or perception of the minister taking sides in the dispute. In my judgment, there is a fundamental difference between the delegation of a discretion to a third party who is not authorised by the terms of the relevant statute to exercise it and the surrender of the exercise of a statutory discretion to the court. Likewise, there is a distinction between the case where the court seeks to exercise a statutory discretion in substitution for an invalid exercise of that discretion by the statutorily appointed decision-maker, and the case where that decision-maker voluntarily surrenders that discretion to a court of competent jurisdiction.

25. Third, section 88 (4) of the 2018 Measure only requires the consent of the 'minister' of the parish to the burial or cremation of the remains of "a person who does not have a right of burial in the churchyard or other burial ground of a parish". As Chancellor Ockelton recognised in *Blidworth Churchyard*, the reservation of a gravespace by faculty gives the right of burial in the relevant burial space for those named in the faculty. I cannot see why the court should only be able to grant such a reservation during a person's lifetime, and not after their death, thereby conferring a right of burial in the churchyard and thus obviating any need for the minister's consent to the interment. However, I am anxious not finally to determine this point if it is not strictly necessary for me to do so. I therefore merely offer this as a convenient possible solution in future cases.

26. In the present case, it seems to me that the former minister has effectively surrendered his discretion to the Court in the absence of any agreement between the opposing parties. In a series of email exchanges and letters with the parties and their families during August to September 2020, composed whilst he was still the incumbent minister, the Reverend Parkinson made it clear that he had submitted this family dispute to the Diocesan Registry. His final letter, sent (by email) on 3 September 2020, expressed the view that "... as things stand, neither of the Grave spaces come under Faculty Jurisdiction, or under the auspices of the Consistory Court". In the case of NGC 101, this was said to be because there was already an existing burial within the grave. In the case of NGC 102, this was because "it appears that this Grave space was

‘reserved’ in an irregular way by Mr Frederick [sic] Mather with one of my predecessors. No Faculty was sought, applied for and granted at the time.” The minister recorded that: “The Registry and the Chancellor note that this is a dispute within a family, with the Church caught in the middle”. The Reverend Parkinson referred to the Archdeacon’s offer of mediation; and he once again urged all members of the family to set aside their differences, come together, and agree on a way forward. The letter concluded: “From this point, the Parish and myself, are no longer directly involved in the matter and, as I have previously stated, all correspondence, and any enquiry, should be addressed to the Diocesan Registry.” The minister seems to have been content to leave the matter for determination by the Diocesan Registry, and impliedly, by the Chancellor, in the absence of any agreement within the family. I consider that I can treat this as a sufficient surrender of the exercise of the minister’s discretion to the court. In case I am wrong, however, I proceed to consider the position on the basis that there has been no lawful and effective surrender of the minister’s discretion to this Court.

27. Following the Reverend Parkinson’s retirement from the parish, since there would appear to be no minister acting as priest in charge, and no curate licensed to the charge, of the parish of Longton, the rural dean of the deanery in which that parish is situated fulfils the role of the ‘minister’ for the purposes of section 88 of the 2018 Measure. Provided the rural dean is prepared to surrender the exercise of the minister’s discretion to this Court, I consider that I would have the necessary jurisdiction to determine this petition. In any event, I consider that I have the necessary jurisdiction to determine whether it would be reasonable and lawful for the minister – effectively now the rural dean - to exercise their discretion to permit the interment of the late Joseph Mather’s ashes within burial plot NGC 101, and upon what terms. On either basis, the consent of the rural dean will effectively be required as a pre-condition to the grant of any faculty.

28. The proposed interment of Joseph’s ashes within burial plot NGC 101 may involve the temporary disturbance of any container containing Rita’s ashes which still exists within the grave. Likewise, any future interment of Ann’s remains may involve the temporary disturbance of the cremated remains of Joseph and/or Rita. I do not consider that this involves any particular obstacle to the fulfilment of Mrs McNamara’s wishes. In my recent judgment (in the Diocese of Oxford) in *Re St Mary, Beenham Valence* [2021] ECC Oxf 4 I granted a faculty permitting the temporary removal of a deceased’s ashes to facilitate a further burial in the same grave plot, on the basis that they were immediately to be re-interred in the same grave. At paragraph 8 I said that I shared the doubts recently expressed by Chancellor Petchey (in the case of *Re Mitcham Road Cemetery, Croydon* [2021] ECC Swk 2 in the Diocese of Southwark) as to whether in such a case the rigour of the general inhibition on exhumation had any application; but if exceptional circumstances were required, I held that they clearly exist in any case of temporary exhumation with a view to facilitating a further burial in the same grave plot, with the exhumed remains being returned immediately to the same grave from which they were to be exhumed. I am not aware that it has ever been suggested that there is no requirement for an appropriate faculty in such a case, presumably because there is generally uncertainty about the precise location, and consequent degree of disturbance, of the existing cremated remains; but in such a case any necessary faculty should issue almost as a matter of course in order to further the Church’s policy of favouring the creation of family graves.

The petitioner’s case

29. Mrs McNamara's case is set out in her written statement of reasons in support of her interment petition on which this section of my judgment is based.

30. Joseph and his wife, Rita, lived in Longton for 40 years. Their son, David, and his wife, Ann, also lived in Longton. Until recently, the extended family believed that shortly after David's death, on 16 November 1982, Joseph had reserved two double-depth grave spaces, NGC 101 and 102, in St Andrew's churchyard. Mrs McNamara states that this belief stemmed from her father's comments and from information provided by Ann. David was buried in NGC 101. The original intention of all the family was that, in the fullness of time, Ann would be buried with her late husband in NGC 101 and, when they eventually passed away, Joseph and Rita would be buried in the adjoining burial plot, NGC 102. Subsequently, Ann met, and fell in love with, Tony. On 16 November 2001, 19 years to the day after David's death, Rita passed away. Because of that, and for other obvious reasons, including the fact that by then Ann was living with Tony, Joseph thought that it would be appropriate for his wife's ashes to be buried with David. Ann originally objected to this; and she produced documentation which she claimed to be the grave reservations. Ann indicated that, despite her relationship with Tony, she intended to be buried with David, and that his parents were to be buried in the adjacent "reserved" space, NGC 102. This was consistent with the "grave reservations" that she had produced. Joseph acknowledged this; and the family therefore prepared to make the funeral arrangements on the original basis, as set out in the "grave reservations" that Ann had produced. Mrs McNamara has no idea now what in fact the documents were that Ann had produced; but she accepts that they were plainly not formal grave reservations issued by the Diocesan Registry. The misunderstanding that lawful grave reservations existed is said to have caused a very regrettable breakdown in clear communications with the (now former) incumbent, the Reverend Parkinson. That information is said to have come from Ann.

31. Ann is then said to have changed her mind and agreed that Rita could be interred with David and that, when the time came, his father (Joseph)'s ashes could also be buried with his late wife and David in NGC 101. She and Tony would then share the adjacent grave space NGC 102. This agreement is said to be evidenced by the fact that on David's grave is a memorial stone divided in two, with Rita's details on one side and with the other side left blank for Joseph's details to be included when he was later interred there. Attached to this judgment is a photograph, taken at Joseph's funeral in April 2020, when his family placed the order of service on the side of the memorial where it was intended that his details were to be engraved. Mrs McNamara also points out that her father changed his long-held wish from being buried to being cremated in order that this new arrangement could be fulfilled, something about which Ann is said to have been fully aware.

32. On 16 April 2020, at the height of the first wave of the Coronavirus pandemic, Joseph died. He had been alone in nursing homes or hospitals for weeks, without the comfort of his family being with him as, at that time, visitors were not permitted. His illness, the manner in which he died, the subsequent funeral (with the restrictions imposed under the pandemic lockdown rules) are said to have been extremely distressing to his family. It was hoped and expected that things would proceed smoothly in light of the 2001 agreement. However, Ann stated to Mrs McNamara's sister, Linda Horstkotter, that she had completely changed her mind, and not only did she not want Joseph's ashes to be buried in NGC 101 but that she wanted to have Rita's ashes exhumed. Ann now wished to be buried with her late husband David in NGC 101 rather than with her partner Tony. She also indicated that she did not even want to allow

Joseph to be interred, and Rita to be reinterred, in NGC 102, which she now wished to be reserved for Tony alone. Mrs McNamara did not understand how that was consistent with the 'grave reservations' that Ann had shown her. The incumbent had suggested a possible solution: that Joseph should be buried in a plot of land that was not reserved by faculty but would be close to, but not within, the burial plot containing the remains of Rita and David; but Ann rejected this possible solution, which was then rescinded by the incumbent. Mrs McNamara asserts that she supported the idea of mediation with Ann; but, sadly, Ann is said to have refused to agree to any of the possible mediated solutions. For example, it was put to Ann that, as NGC 101 is a double plot, there would be space for her to be buried with David as well as Joseph and Rita, but she would also need to be cremated. Ann would not accept this as a compromise as she does not wish to be cremated.

33. In conclusion, Mrs McNamara says that her late father lived for many years in the parish, only leaving to go into a nursing home in 2019. She believes therefore that he has a right to be buried in the churchyard at St Andrew's. She also understands that there is strong support for the creation of family graves in Church of England churchyards, and she believes that granting this petition would create just that.

The objector's case

34. Ann's case is summarised in the statement that accompanied her particulars of objection on which this section of my judgment is based.

35. As stated at paragraph 6 above, Ann originally objected to this petition on the basis that her consent to the interment of the Rita's cremated remains in NGC 101 was given under the mistaken belief that this was not a double-depth grave plot so that she could not be buried in that plot; and that any further interment of cremated remains was likely to prevent her own future burial in that plot in the future. When David died in tragic circumstances in 1982, Ann was only 24 years old and she was in deep shock, for which she was prescribed tranquiliser medication. As a result, her father-in-law, Joseph, offered to help her with the funeral arrangements. She completely trusted him, believing that he would do the right thing and abide by her wishes. Joseph initially assumed that a cremation service was to be organised for David as he and Rita themselves wished to be cremated in due course; but Ann insisted that David was to be buried because she came from a family who believed in Christian burial and, when her own time should come, Ann's wishes were also to be buried in the same grave as David. Ann maintains that she clearly stated to both Joseph and Rita that she simply wanted one double grave in St Andrew's churchyard for both herself and David. So Joseph and Rita arranged David's funeral with the Reverend Tom Thomson, the then incumbent of St Andrew's, and McKenna funeral directors on her behalf, for which Ann was sent all the invoices for payment in due course. Ann says that she had no contact whatsoever with the incumbent, either in the days after David's death up to the funeral on 26 November 1982, or thereafter. Ann had no reason to doubt that, in accordance with her wishes, Joseph and Rita had arranged for David to be buried in a double-depth grave and, in time, that Ann could also be buried in that plot.

36. When, on 16 November 2001, Rita sadly died, in accordance with her wishes, expressed at the time of David's death, her family arranged for her to be cremated. Just a day or two after Rita's death, Ann maintains that Joseph telephoned her to inform her that he was going to inter Rita's remains in the "family grave". When Ann asked where that was, he said that it was David's grave. This was the first time since David's death that Joseph had ever used this phrase when

speaking to Ann. During this conversation, Joseph also informed Ann that he had reserved a separate grave plot for her. He stated that both were single-depth plots and that she would be buried "side by side" with David in grave plot NGC 102. At that time, Ann had no reason to doubt this information. She simply believed that Joseph and Rita had not respected her wishes for David's funeral arrangements back in 1982. Shortly after this conversation, the eldest of David's three sisters, Mrs Susan McNamara, the petitioner, came to Ann's house unannounced and asked to look over the paperwork that Ann had retained for David's funeral and his grave. This paperwork was still in the original envelope and consisted of the invoice issued by McKenna Funerals Ltd, dated 2 December 1982, for £565.70 addressed to Ann, which included an item of £72 for "new grave for (2) at St Andrew's Parish Church"; the receipt for the payment from "Mrs Mather"; a handwritten receipt for £72 addressed to the funeral directors by St Andrew's PCC, including £25 for "new grave"; and an invoice dated 14 April 1983 from McMurray Brothers of Preston for £499.23, addressed to Mrs Mather, for the memorial stone, inscription and churchyard fees. Ann states that Mrs McNamara witnessed how tearful and distressed Ann was by the belief that, contrary to what she had always wanted, she would have to be buried in grave plot NGC 102 rather than in the same grave as David. During that tearful conversation, which was the first and only time that Ann spoke with Mrs McNamara regarding this matter, Ann questioned the reference to "new grave for (2)" on the invoice issued by McKenna Funerals Ltd and whether or not that this may actually have meant two different plots. Back in 1982 Ann had assumed that it meant a grave for two people. This was the first time that Ann had looked at David's funeral invoices since she had stored them safely away in her bureau back in 1982. She had not felt any need to do so, being secure in her belief (which Ann describes as "naïve") that Joseph and Rita had made all of the arrangements in accordance with Ann's wishes. As a result, Ann described her mind as being

"... then in turmoil, it had never been my intention for the cremated remains of anyone else to be interred in or around David's grave. The only 'family grave' I had sought to establish was for David and I, as husband and wife. I therefore initially refused Joseph's request for Rita's cremated remains to be interred in the grave."

37. Ann describes feeling that she had been ostracised at Rita's funeral. She says that it was an awful time for her. She was depressed and this may have contributed to Ann's failure to query the situation directly with the incumbent at the time. Ann was also working full-time and was very busy with Tony building their house. Ann's life was very different to what it is now that she is retired and has had the time needed to make appropriate enquiries. Further, Joseph, who was the patriarch of the family, whom Ann respected, has now passed away and Ann has felt free to ask questions and to get to the bottom of the matter. After a few months of being ostracised from their family, Joseph's daughter, Linda Horstkotter, paid Ann a visit. She asked Ann if she would now be able to consent to the interment of Rita's cremated remains in David's grave. At this time Ann says that she reluctantly agreed, but this was only because Ann truly believed that she had to be buried in the single plot NGC 102 "side by side" with David. The interment of Rita's cremated remains in David's grave therefore went ahead in February or March 2002, after which Ann was taken back into the family fold.

38. Ann says that she was always remained troubled by the events of 2001. With hindsight, she regrets being naïve and trusting and thus not contacting the incumbent to query the matter. However, after Ann's own mother's death and burial in 2012, she again started to question what she had been told about David's grave. Her own mother had been buried with Ann's late father

in a double grave in a council cemetery, and her family had received paperwork which detailed a grave number and so forth. Ann realised that she had never received any similar documents for either of the two grave spaces at St Andrew's churchyard; all that she had were David's funeral invoices. In August 2012, Ann therefore arranged to visit the Reverend Andrew Parkinson, the then incumbent of St Andrew's. She took all of her paperwork for David's funeral to this meeting, including the receipt from the PCC dated 26 November 1982, the date of David's funeral. One of the itemised payments was the £25.00 which was described as being for a "new grave", which Ann now understands may have been the receipt for an "irregular payment" to reserve the grave plot next to David's grave, NGC 102, at the time of his burial. It was at this meeting that Ann was informed that David's grave was in fact a double-depth plot which could accommodate Ann's own burial in due course. She therefore realised that she had been misinformed in 2001 and could still be buried with her late husband, just as she had always intended. After that meeting, Ann received a letter from the incumbent, dated 11 August 2012, referring to their meeting and stating that:

"During the time of my predecessor, the Revd Tom Thompson, you reserved two grave plots in the Churchyard in Longton. The numbers of the graves are:

NGC 101 - one burial - Mr David Mather. 1982

NGC 102 - no burials

Please keep these numbers in a safe place for future reference."

39. Up until Joseph's death on 16 April 2020, Ann had assumed that the August 2012 letter would be all that she required in order to secure her future burial in David's grave. She had not discussed with the incumbent, nor was Ann made aware of, any requirement for a "Faculty" to authorise her burial in either of grave plots NGC 101 or NGC 102. Following Joseph's death and cremation, Linda Horstkotter again visited Ann to seek her consent for the interment of her father's cremated remains in David's grave. However, in light of the information that Ann had acquired in 2012, she declined to give her consent for the interment to go ahead, fearing that this might well impact upon her own future burial in David's grave. Since then Ann has spoken with the Reverend Andrew Parkinson on a number of occasions, and he has again confirmed, in various emails and letters, that Ann can be buried with David. The most recent letter, written on 8 April 2021, after his retirement from the parish, states that:

"In all my dealings with Mrs Mather I have never altered my stance that her wish to be buried with her late husband should not in any way be compromised. I hope that in all considerations the Chancellor will hold Mrs Mather's wishes as a priority."

40. Ann believes that, at some time between 1982 and 2001, her in-laws unilaterally concluded that her subsequent relationship with another man (her current partner, Tony) had altered Ann's desire to be buried in David's grave. In fact, Ann's intention had not altered at all by 2001 and still remains unchanged: she wishes to be buried in the same grave as her late husband, David. The only reason that Ann changed her mind about the interment of Rita's remains in David's grave was due to her mistaken belief that it would never be possible for her to be buried with him. The suggestion that Ann would be buried in NGC 102 had only arisen as a result of her conversation with Joseph, during which Ann was told that both graves were of single-depth only. Ann's future burial in NGC 102 was not something she ever wanted; but she felt at the time that she had to accept this as being the only way in which she could be buried

with David. Ann acknowledges that she “was not privy to the conversations between the two different incumbents and Joseph” so she does not know what Joseph was informed about the two burial plots.

41. It is Ann’s understanding that Rita’s cremated remains were interred in a casket close to David’s memorial stone in 2002. As a result, Ann has been repeatedly assured by the Reverend Andrew Parkinson that this would not prevent her own burial in David’s grave; but Ann is concerned that the interment of Joseph’s cremated remains in David’s grave might well affect this. Ann has therefore asked Mrs McNamara to confirm where in David’s grave she believes her late mother’s cremated remains to have been interred, and where she would wish her late father’s cremated remains to be interred, but she is said to have declined to respond. Ann has also sought written reassurance from Mrs McNamara that all three of David’s sisters (i.e. Susan, Linda and Karen) all understand the situation and are agreeable to Ann’s burial in David’s grave in due course. Again it is said that Mrs McNamara has declined to respond.

42. Ann points out that she was diagnosed with cancer in 2014 and is still on medication. Although she is presently in remission, Ann’s own passing remains at the forefront of her mind; and it is vital to her that she can be certain that her own family will be able to honour her wish to be buried in the same grave as David without experiencing any further hurt or upset. After much deliberation, Ann says that she has eventually been able to forgive Joseph for misleading her all those years ago; and that is why Ann now offers to consent to the interment of Joseph’s cremated remains in David’s grave, provided this does not prevent Ann’s own future burial there in due course. For Ann’s peace of mind, and finally to have some closure after 39 years, Ann will leave it to the court to determine whether: (1) her own burial is to be permitted in David’s grave in due course; and (2) precisely where Joseph’s cremated remains should be interred. In reaching my decision I am invited to be mindful of Ann’s own unwavering intention (first expressed in 1982) to be buried with David, the fact that any Christian burial should be final, and Ann’s offer to resolve this matter. However Ann does ask that, whatever my decision, I should order that no further interments should be permitted in David’s grave plot. This would then provide all three of David’s sisters, and Ann’s own family, with much needed certainty in respect of David’s grave. If I authorise both Ann’s own burial, and also the interment of Joseph’s cremated remains, in David’s grave, Ann trusts that I will also identify the precise location where those remains should be laid to rest, thereby avoiding the need for any future application for exhumation. However, Ann makes it clear that she cannot bear thinking about the scenario of Joseph’s ashes being interred in David’s grave if her own burial is refused. After all the promises made by the Reverend Parkinson, Ann considers that that would be unthinkable and a second betrayal - this time by the church - which Ann does not think she would be able to accept.

43. Finally, Ann is concerned to clarify her position in relation to the existing memorials on David’s grave. After Rita’s interment in 2002, Joseph installed a second memorial stone on David’s grave to commemorate his late wife. Ann says that this was done against her wishes and without her consent. She remembers suggesting to Joseph that an urn for flowers, inscribed with Rita’s name and date of death, would be appropriate, but this did not happen; instead, a second, large, open-book memorial was placed on the grave. Ann says that whilst she has never been comfortable with this memorial on David’s grave, she no longer wishes to have it removed. However, if the church had followed their own faculty procedures for the introduction of the second memorial, Ann would have had the opportunity to object to it, and the true position might have come to light earlier. Ann therefore considers that the PCC should take some

responsibility, especially around her legal costs which she says that she can ill afford. Although Ann no longer seeks the removal of Rita's memorial stone from David's grave, Mrs McNamara and her sisters must appreciate that, if Ann is to be buried in David's grave in due course, this will necessitate the temporary removal and re-siting of this second memorial stone. Since this may incur an additional cost to Ann's own family, it seems to Ann that it would be only fair for the costs of re-instating the second memorial to its current position, in due course, to be borne by Mrs McNamara's family.

The petitioner's response

44. Mrs McNamara understands that her late father, Joseph, paid the fees for David's burial, and also for Ann's future burial in grave plot NGC 101. The original intention, following David's death, had been that Ann would also be buried in that grave in due course. Joseph 'reserved' the adjoining plot NCG 102 for the burials of himself and his wife in due course, and not as a separate grave plot for Ann. The family now understand that such reservations were made on an informal basis with the Reverend Thomson and that no formal records of this reservation were kept by the church authorities. Due to Ann's objections, the family were unable to inter Rita's ashes in NGC 101 at the time of her funeral, causing the whole family further pain and distress during their time of grief. Rita's remains were interred in grave NGC 101 with her son, David, with the permission of Ann and the Reverend Andrew Parkinson, 12 months after her death, on 16 November 2002, after Ann had changed her mind and agreed to Rita's remains being interred with David, having decided that she would be buried in the adjoining grave space, NGC 102, with her partner, Tony, in due course. At this time, it was also understood that Joseph too would be interred in the same grave with his wife and their son. Joseph had always wanted to be buried but, as his wife and their son were already interred in NGC 101, Joseph changed his wishes so that his cremated remains could be interred with them. Joseph's family understand that Ann was always fully aware that both graves are of double-depth, as are all the graves in the churchyard. The invoice from McKenna Funerals Ltd (which forms part of Ann's exhibit AHM 1) is said to show this. There is absolutely no reason why Joseph should have stated that they were single-depth graves; everyone involved knew the original arrangements and they all knew that the graves were double-depth, and that the original intention had been for Ann and David to be together. Indeed, there has never been any suggestion of these graves being of single depth until this petition was submitted. The idea that Mrs McNamara's parents had deceived Ann in any way is said to show a complete and utter lack of respect for her parents and ingratitude for everything they have done for her during her marriage to David and following his death. There is no question that Ann did not know that they were double-depth graves. It would have been possible for Ann to have asked any number of people should she have been in any doubt about that. Indeed, the family understand that she met with the funeral director dealing with Rita's funeral to discuss the matter. No misinformation occurred and nobody deceived Ann. She changed her mind in 2001/2002; and then she changed her mind again in 2020.

45. A memorial stone in the shape of an open book was placed on the grave: the left-hand page had an inscription commemorating Rita and the right-hand page was left blank for the commemoration of Joseph to be inscribed in due course. Ann had been consulted over the choice of the memorial stone and she had agreed to it.

46. The family do not understand why Ann's wishes should be given any priority over theirs and why the Reverend Parkinson should have requested this in his letter of 8 April 2021 (in exhibit AHM3). The fact remains that there have been two burials in NGC 101, and the wishes

of all parties concerned should be given equal consideration. Whilst Mrs McNamara accepts that there is no right for her father's remains to be buried in any particular space, as a parishioner he has the right to be buried in the churchyard; and there is strong support for the creation of family graves in the Church of England. It now appears that Ann no longer objects to the interment of Joseph's remains in David's grave, provided that she too can be buried there; and the family have never had any objection to this, provided that this does not prevent Joseph's interment in that grave.

The objector's reply

47. Whilst Ann does not believe that the determination of who paid for what back in 1982 will assist in resolving the present situation, she strongly objects to the claim that Joseph paid the various fees for David's funeral and burial or for the reservation of any other grave space. Ann does not dispute that her father-in-law made the funeral arrangements; but she maintains that she was responsible for all of the relevant costs. The receipt dated 10 January 1983 (which forms part of exhibit AHM1) is said to indicate that Ann had settled the funeral fees, and she is now aware that no fee is payable for a grave space itself, but only for the relevant service involved in interring the remains in the churchyard. Therefore, if any unauthorised fee was paid to reserve a second grave, Ann believes that this is the sum of £25 shown on the receipt issued by the PCC and included on the funeral director's invoice, which Ann had paid. Again, although Ann does not believe that determining when her late-mother-in-law's remains were laid to rest in David's grave is material to the present application, and she accepts that some months did pass between the date of her death and her interment, Ann struggles to accept that this was a full year, believing that the interment took place in February or March 2002

48. Mrs McNamara claims that Joseph had "always wanted to be buried" but that he later changed his mind so that he might be interred in the same grave as his wife and son. If it is acknowledged that David's grave is a double-depth grave, Ann points out there would have been no need for Joseph to have altered his plans, and chosen to be cremated, had he believed that Ann was to be buried in the adjoining grave NGC 102. Ann reiterates that, after Rita's death, she had thought that she had no alternative but to be buried in grave NGC 102 due to her understanding, based upon her conversation with her father-in law, that both of the graves were actually only of single-depth. Ann accepts that Joseph was grieving after the loss of his wife and that he may not have been thinking straight. However, she finds it an inexcusable error of judgment on Joseph's part to have assumed that it would be acceptable to Ann for her to be buried elsewhere than in David's grave, and for him to have indicated that he had reserved a separate grave for Ann. Ann attaches (as exhibit AHM 6) an email dated 24 June 2021 from a funeral director stating that:

"We have checked the grave today and can see there is enough room for 1 full burial and enough room for as many ashes caskets as required."

Ann reiterates that her objection to the use of grave space NGC 101 arose from her belief that it was not possible for her to be buried in that grave with David and therefore she would need to be buried in NGC 102. She says that her mind had been in turmoil at that time as she had struggled to understand what had suddenly changed. Her partner Tony's burial was not discussed, and it was never a consideration at that time. Ann also relies upon a statement from Tony confirming that, throughout their relationship of over 30 years, Ann has always expressed it as her wish that, in due course, she should be buried in her late husband's grave in St Andrew's

churchyard; and that there has never been any agreement that Tony should also be buried in that churchyard. Ann states that she felt that she had no alternative but to agree to her remains being interred in NGC 102 in due course, thereby permitting the interment of her late-mother-in-law's cremated remains in David's grave. Ann says that it did not suit her at all to be buried "side by side" in NGC 102.

49. Ann notes that the family are ready to accept compromises, and that their only wish is for Joseph's remains to be laid to rest with his wife and son. Ann says that she too is ready to accept compromise, and that she has already withdrawn any previously suggested proposal to seek the removal of the second memorial stone and the exhumation of her mother-in-law's remains. Ann too has found this dispute hugely distressing, and she has also paid out considerable sums in obtaining specialist legal advice. She has no desire to distress any of her sisters-in-law; but Ann herself is distressed by the thought that she might not be able to be buried with David. In the light of the opinion of the funeral director that there is sufficient space in David's grave to accommodate this, and bearing in mind the views of Mrs McNamara and her two sisters, Ann would be content for the court to order as follows:

- (1) That permission is granted for Joseph's cremated remains to be interred in grave NGC 101 forthwith.
- (2) That the location of such interment in grave NGC 101 should in no way compromise the future use of the remaining full body burial space in that grave.
- (3) That the remaining full body burial space in grave NGC 101 be reserved for Ann's sole use.
- (4) That no other interments of any kind should be permitted in that grave.
- (5) That permission is granted for the temporary relocation, in due course, of the second 'book-style' memorial for the purposes of digging the grave for Ann's burial and the subsequent settlement of the ground, with the costs of such burial to be met by Ann's next-of-kin, and any costs incurred in the relocation of the second 'book-style' memorial being met by the petitioner's family.

50. Joseph's family are content to agree elements 1 to 4 of these proposals; but whilst they are prepared to agree to the temporary relocation and re-siting of their parents' memorial stone, and to meet the costs of this, they are adamant that under no circumstances should this memorial stone be removed by anyone outside their immediate family, neither Ann nor any member of her family. Ann has since revised elements 1, 2 and 5 of her original proposals so as to make it clear that Joseph's cremated remains, and any remaining container holding Rita's remains, should be placed underneath David's headstone so as to facilitate Ann's own interment in due course.

Disposal

51. I do not propose to make any attempt to determine precisely what in fact happened at the time either of David's burial or of the later interment of Rita's ashes for the following reasons: First, it is not possible for me to make any clear findings of fact on these matters, even on the balance of probabilities, because of the lack of relevant witness evidence. David died 39 years ago, and Rita died 20 years ago. The two people most directly involved, the Reverend Tom Thompson and Joseph, are no longer available to provide any evidence or assistance. Mrs McNamara says that her own understanding is derived from her late father and from

information provided by Ann. Ann herself says that she had no contact with the incumbent at the time of David's funeral, and that she had left everything to Joseph. At paragraph 17 of her statement in reply, Mrs McNamara states that the suggestion of Ann being buried in NGC 102 was due to the fact that Joseph "thought it would be acceptable as she would still be next to David and she had been in a relationship with Tony for over thirty years, living as common law husband and wife". This suggests that Joseph may have acted on the assumption that Ann would be content to be buried in NGC 102, clearing the way for NGC 101 to become a family grave for David and his parents. However, I make no finding to this effect; and even if I were to do so, this would not explain why (as stated by Mrs McNamara at paragraph 45 of her reply) Joseph "was required to alter his wishes to be buried to that of a cremation to be able to be buried in NGC 101" if it was always understood that all the grave spaces in the churchyard (including NGC 101) were of double-depth. There are too many aspects of the evidence in this case that simply do not seem to make any sense. Second, it is not necessary for this court to reach any clear findings on these matters to determine the present petition. Happily, a sufficient degree of unanimity between the parties has already been achieved to enable the Court to reach a clear decision on the sensible, appropriate, and proportionate way forward. Third, it would be undesirable for the court to attempt to make findings of fact on evidence which is incomplete, unclear and contradictory when this would only serve to aggravate the existing disagreements and ill-feeling within the wider family. The court should seek to foster a spirit of reconciliation within the family, rather than promoting ill-feeling and ill-will.

52. On the evidence, it is now clear that Joseph's cremated remains can safely be interred within David's grave without compromising Ann's ability to be buried there when her time comes. I determine that it is reasonable and proper for Joseph's ashes to be laid to rest with his late wife Rita in David's grave; and that it would be lawful for the minister to exercise his discretion so as to permit this. However, this should be subject to the condition that Joseph's ashes are to be placed in such a position within David's grave that the future use of that grave space for the burial of Ann's body is not compromised in any way. Subject to the consent of the rural dean (as minister of the parish of Longton for the purposes of section 88 of the 2018 Measure) I grant a faculty to this effect. If it is necessary temporarily to remove any remaining container holding Rita's ashes from the grave, I grant a faculty permitting this, on condition that such container is immediately returned to the grave in a position which will not compromise the future burial of Ann's body in due course. I direct, by way of further condition, that the parties are to agree upon the appointment of a reputable and experienced funeral director to carry out the interment of Joseph's ashes, which is to be done consistently with the requirement not to compromise the future burial of Ann's body in the grave in due course. In default of agreement, such funeral director is to be appointed by the Registrar by drawing lots from a list of four names (with two names to be supplied by each of the parties). I determine that it is also reasonable and proper for Ann's body to be laid to rest with her late husband David when her time comes. Subject to Ann presenting a cross-petition for such a reservation, and to the consent of the rural dean, I will grant a faculty reserving grave space NGC 101 for the future interment of Ann's remains when her time comes, on condition that no further burials or interment of ashes are to be permitted in that grave. I direct, by way of condition, that such interment is to be conducted by the funeral director who shall have conducted the interment of Joseph's ashes (if available) or otherwise by a funeral director to be agreed or appointed in the manner previously indicated. I further direct, by way of condition, that the costs: (1) of the interment of Joseph's ashes are to be borne by his estate; and (2) of Ann's burial are to be borne by her estate; save

that the costs of any necessary temporary relocation of the book-style memorial commemorating Rita (and Joseph) are to be borne by Joseph's estate. **In order to allay any concerns as to the extent of my jurisdiction, the consent of the rural dean should be obtained prior to the grant of the appropriate faculty.**

Costs

53. I have not received any submissions as to costs. My provisional view is that the petitioner should bear the court costs of this petition (including any additional costs of all correspondence with the Registry) in the usual way. The party opponent must bear the court costs of any petition she may present seeking a reservation of the right to be buried in grave plot NGC 101 in her own favour. As for the parties' own costs, they should lie where they fall, with each party bearing their own costs. Both parties' positions have shifted during the life of this dispute. With a little more goodwill on each side, the need for this petition could have been avoided. Although there is presently no cross-petition, both parties have effectively been in the position of petitioners seeking appropriate relief from the court in their favour. If either party dissents from this course, they may submit written representations on the issue of costs within 14 days after receiving this judgment and at the same time serve a copy on the opposing party. The counter-party may submit to the court, and serve on the opposing party, counter-representations within 14 days thereafter. I will then determine the issue of costs on the basis of those written representations.

54. For pastoral reasons, I waive any fee for the considerable work I have undertaken in preparing this written judgment.

David R. Hodge

The Worshipful Chancellor Hodge QC

The First Sunday in Advent 2021

