

Neutral Citation Number: [2018] ECC StA 2

IN THE CONSISTORY COURT OF THE DIOCESE OF ST ALBANS

IN THE MATTER OF: CHESHUNT CEMETERY (No 2)

PETITION NUMBER 476

THE PROPOSED EXHUMATION OF THE LATE INFANT TED TWILLEY

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JUDGMENT

1. On 8 December 2017 a petition was presented seeking the exhumation of the cremated remains of their baby son, Ted Twilley (“Ted”) who died tragically aged 2 days on 12 January 2004. The petition was presented by Ted’s parents, Mrs Karen Twilley and her husband Mr Robin Twilley (the “Petitioners”). The Petitioners appeared in person before me at a hearing held at the offices of the Diocesan Registry on Tuesday 26 June 2018. They are supported in bringing the petition by the views of their family and in particular their other two children, Alfie, now aged 16 and Darcee, now aged 12.
2. I will say at the outset of this judgment that I am unable to grant permission to exhume Ted’s remains. I will explain below the reasons why that is so. Despite that conclusion on the application of the facts of this case to the legal framework, I wish to express my gratitude for the brave and dignified way in which the Petitioners approached a very difficult hearing involving, as it did, distressing memories and an emotionally challenging context.

Facts:

3. Ted’s body was cremated and his remains interred in an identified plot in consecrated ground in Cheshunt Cemetery on 3 June 2004. The evidence I received at the hearing as to the funeral arrangements was that the Petitioners made the funeral arrangements themselves, assisted by Co-op Funeral Care. Ted was given a Christian funeral service at Enfield crematorium by a local clergyman (recalled by the Petitioners as “Father

Tom” but about whom no further details have been adduced) whose presence was also arranged by Co-op Funeral care, but with whom the Petitioners were very happy. The plot they were shown in the cemetery was with other children, which pleased the Petitioners, but they did not enquire into and were not provided with any explanation of the nature and significance of the consecrated ground.

4. The documentary evidence I received in this matter set out that the Petitioners are “*from non-religious families*”. It was stated that they are non-Christian. No other belief or faith was referred to in the papers and when asked about this at the hearing no other system of belief was identified, only that they are not Christian. However, during the course of the hearing I was also told by Mr Twilley that they were happy with the fact that Father Tom had provided a Christian funeral service for Ted.
5. Another important factor revealed at the hearing was Mr Twilley’s view that the Petitioners did not feel there was any better place for Ted’s ashes to be interred at that time, as that was the only place with other children buried nearby that was shown to the Petitioners.
6. The Petitioners attend Ted’s grave regularly, around every other week, and keep it well-presented. I am informed that both Mrs Twilley and her son Alfie, in particular, have sadly been deeply affected by Ted’s loss and that Alfie has received counselling for anxiety which the counsellor attributed to Ted’s death.
7. The Petitioners intend to move from their existing home later this year, in perhaps 3 or 4 months’ time. At the hearing I was informed that the move that is planned is to Royston, some 28 miles away. However, the Petitioners have in mind a possible future move to Cyprus in 5 or 6 years’ time. Their wish is to exhume Ted’s ashes in order to keep them at home with them and take them with them to whatever homes they live in from time to time. There are no plans to re-inter Ted’s remains. Indeed documentary evidence before me stated that the Petitioners “...*want our son to be with us...*” after they move, and that “*As years have passed this has been a huge regret and we now wish we had kept Ted’s ashes with us but at the time we thought we were doing the right thing by placing him in a cemetery.*” Ultimately, the intention

would be to later re-inter Ted's remains with those of Mrs Twilley when she eventually dies.

8. Written evidence provided by the funeral director is that Ted's remains were interred in a polythene bottle which is impervious and, despite the passage of time of over 14 years, will not have decayed.
9. This matter came before the Chancellor, His Honour Roger Kaye QC, on paper on 13 December 2017. He had a number of questions for the Petitioners which they duly answered, the papers being returned to him on 26 January 2018. The Chancellor requested that the Registrar seek the views of the local Archdeacon. On 17 March 2018 the papers were returned to the Chancellor following receipt of the views of the Archdeacon of Hertford, who indicated that she knew of no reason for this matter to be treated as an exception to the general presumption of permanence of Christian burial (to which I return below). The Chancellor gave a preliminary indication that this, together with the substantial lapse of time since interment, the lack of any mistake and the lack (at that time) of any evidence as to the likely condition of the container meant that the Petitioners had not discharged the burden of proof at that stage. However he permitted the service of any further materials relied on by the petitioners, to be followed by a hearing before me to lead to a final decision of this Court.

Legal framework:

10. The starting point is the presumption that the burial of human remains in consecrated ground is permanent. As described in *Re Tunbridge Wells Cemetery* [2016] ECC Roc 1 "*The presumption arises from the Christian theology and tradition that burial, or as here, the interment of cremated remains, is to be seen as the act of committing the mortal remains of the departed into the hands of God as represented by His Holy Church*". The permanence of Christian burial has been rigorously upheld by the Consistory Courts.
11. However the Court has a discretion to permit exhumation in exceptional circumstances, which is the subject of the Court of Arches judgment in *Re Blagdon*

*Cemetery* ([2002] Fam. 299). The factors identified in that case, although not determinative nor representing an exclusive list of potentially exceptional circumstances, provide guidelines as to how the Court should exercise its discretion. In broad summary, they are as follows: (1) medical reasons: although the deteriorating health of surviving members of the family, which may make it difficult for them to visit an existing grave, is not normally a sufficient reason in itself to justify an exhumation; (2) lapse of time: generally, the longer the period since the original interment, the more difficult it will be to show that the removal of the remains is justified; (3) mistake: a simple change of mind on the part of the surviving relatives about where the remains should be interred is not generally sufficient justification for the grant of a faculty. However a genuine error as to the nature of the ground may be sufficient to justify permission being granted; (4) local support: the support of close relatives is normally required, but the support of third parties is not usually a relevant consideration; (5) precedent: the Court will have regard to the possible effect of any faculty granted to authorise an exhumation in setting a precedent and will not wish to undermine the general presumption that interment is intended to be final; (6) the Court will have regard to the existence of an established family grave plot, and may be prepared to grant a faculty for exhumation where the intention is to bring the remains of family members together in one plot.

12. On the case that has been presented to me, and relating that to the legal framework I must consider, I apprehend that the Petitioners seek to establish that a mistake was made in burying Ted's remains in consecrated ground. They seek to do so in two key ways. On the one hand, the dual facts that they are not a religious family and that the significance of consecrated ground was not explained, or not adequately explained, are cited as reasons for the request to exhume Ted's remains. On the other hand, it is also suggested, frequently throughout the papers and reemphasised at the oral hearing, that the arrangements for Ted's funeral (including their use of Father Tom and the Christian funeral service) and the location of Ted's interment were matters of the Petitioners' choice and suited the family very well at the time and for many years afterwards, but that the imminence of moving, and perhaps later moving abroad, have caused them to reconsider the arrangements now.

13. In particular, Mrs Twilley's evidence was that it had often occurred to her over the years that she would like to move Ted's ashes and keep them at home, but she had never done anything about it and it was the fact that they were moving (and, Mr Twilley added, the fact that family members were getting older) which had brought matters to a head at this stage.
14. Based on what I have heard and read, the dominant factor in this case is the change of mind the Petitioners have had as to where Ted's remains should be located. The change of mind appears to have gradually increased in strength over the years and has been crystallised now by their moving house. Although I accept that the family are not a religious family, and may not hold Christian beliefs, at the time of Ted's funeral a Christian service was chosen by them, and the evidence I received from Mr Twilley was that they received a lot of comfort from it and from Father Tom. It was not suggested that a lack of religious views meant that the Christian service had been inappropriate or undesirable. The interment of Ted's ashes (rather than keeping the ashes at home, which is their choice now) as part and parcel of that religious process was consciously chosen at the time. Having made the decision to inter Ted's remains, I received unequivocal evidence that they would not have chosen any other part of Cheshunt Cemetery in which to do so.
15. These factors lead me to conclude that the type of mistake subsisting in this case, if mistake is the right way of describing it, is one of a change of mind rather than the other (potentially operative) type of mistake which has been alluded to in evidence, but which I find has not been made out, namely a lack of understanding as to the significance of interment in consecrated ground. The Court of Arches in *Re Blagdon Cemetery* was clear that "...a change of mind as to the place of burial on the part of relatives or others responsible for the interment should not be treated as an acceptable ground for authorising exhumation."
16. Related to the Petitioners' change of mind is another factor I am concerned about in this case, namely the lack of plans for future re-interment of Ted's remains. The Petitioners have been open and clear about their intention to carry Ted's remains with them from home to home. Where the permanence of burial is the norm in relation to

consecrated land, the Court of Arches in *Re Blagdon* said that “...remains are not to be regarded as “portable” at a later date, because relatives move elsewhere and have difficulty visiting the grave.”

17. Accordingly, despite the fact that the change of mind in this case is undoubtedly honestly and deeply felt, there is no basis upon which I can grant the petition by reference to the central arguments of the Petitioners’ case.
18. It is important that I turn to the other factors that are apparent on the facts of this case and ensure that they are evaluated properly as to weight and relevance.
19. There has been over 14 years since the interment of Ted’s ashes. Whilst I accept the evidence given by the funeral director that the polybottle in which Ted’s ashes are stored will still be in good condition, the condition of the remains is not the only relevance of the passage of a long time since interment. In particular, although the Court of Arches in *Re Blagdon* stated that time alone should not be determinative, it went on to say that “...It may well be a factor in relation to assessing the genuineness of the petitioner’s case. Long delay with no credible explanation for it may well tip the balance against the grant of a faculty but time alone is not the test.” In this case there is a lack of explanation as to why there has been such a long delay and the conclusion I come to is that the family were content with where Ted’ ashes were for many years, but have, over time, changed their minds. Although I do not regard it as a determinative factor, I do regard this as significant.
20. There were other factors raised before me which I have noted, but which I find do not operate materially for or against the grant of a faculty. These were matters such as:
  - a. The anxiety suffered by Mrs Twilley and Alfie. I was sorry to hear of this but I have not taken this factor into account in reaching my decision. There was no medical or other independent evidence on these points;
  - b. The support of the Petitioners’ children and family I respect as important in the context of their bringing the petition but it does not, in my view, amount to any sort of special circumstance of itself;
  - c. Furthermore, the fact that Mrs Twilley has an as yet unplanned but clear desire to be buried with Ted’s remains in due course is not a special circumstance

(such as a proposed re-interment in, for example, an established family grave, might be) and accordingly I do not rely on that element of the evidence in my considerations either;

- d. As to precedent I am concerned that authorisation of exhumation on the facts of this case, as I have referred to them above, may ring bells of familiarity for potentially many others in a similar position.

21. Weighing all of the matters I have referred to above leads me to the conclusion that the Petitioners have not been able to rebut the presumption in favour of the permanence of burial in this case.

22. It follows that I must refuse this petition. The costs of the petition shall be calculated by the Registrar and paid by the Petitioners in accordance with the *The Ecclesiastical Judges, Legal Officers and Others (Fees) Order 2017*. However, in relation to the fee prescribed at paragraph 4(2)(11)(a) of the Order, I direct that only half of this fee should be payable in respect of this Petition; the Consistory Court was able to hear two Petitions in a single morning, in accordance with Rule 1.1 (2)(b).

Lyndsey de Mestre QC

Deputy Chancellor

18 July 2018