

Neutral Citation No.[2019] ECC Chr 2

In the Consistory Court of the Diocese of Chester

063/18

In the Matter of Landican Cemetery

Judgment

This judgment will be anonymised in respect of the names of the petitioner, the party opponent and members of their respective families, though not the cemetery concerned.

Of necessity, the judgment must make reference to some matters of undoubted personal sensitivity. My concern has been, as far as possible, to reduce distress to everyone concerned.

Introduction

1. By a petition dated 31st July 2018 the petitioner, Mrs AB (now 47), seeks permission to exhume the remains of her still-born son D, who died at 38 weeks on 12th June 1991, now approaching 28 years ago.
2. D's remains are in an oak coffin interred in a numbered plot in the consecrated section of Landican Cemetery, operated by Wirral Borough Council. The plot is an '8 foot' grave, which the cemetery authorities say could, normally, be anticipated to accommodate up to three (full) adult burials.
3. D was buried on 24th June 1991. His mother attended his funeral.
4. No formal memorial on the grave commemorates D.
5. All the practical arrangements were made by Mr JK (now 48), the party opponent, who invited the court to dismiss the petition.
6. JK claims to have been D's natural father, something AB vehemently denies.
7. There is no issue that he was, at the time of D's birth, the father of one of their sons, born in 1990, and, further, that he is the father of two further sons born to the couple in 1992 and 1996.
8. I made clear at an early stage that any attempt formally to determine paternity was beyond the scope of these proceedings.
9. The mother's case was that the parties had separated briefly in 1990 and that D's father was an individual, whose surname and whereabouts are unknown to her, with whom she had a brief relationship before returning to live with JK. She said she had not seen D's father since December 1990.
10. JK insisted, with some emotion, D was his son and, as he put it to me during his evidence, 'he would not be here today', were it otherwise.
11. Further, he is the owner of the grave. He has visited it regularly over the years (as, of course, has AB) and has placed various (unauthorised) ornaments and surrounds upon it at different stages.

12. He strongly opposed exhumation considering it unnecessary, inappropriate and wholly distasteful that D's remains should be removed from what he termed 'sacred ground'.
13. For reasons which I shall shortly explain, and about which she feels equally strongly, AB seeks to exhume D's remains, have them cremated, and then to place the cremated remains in a designated rose garden area at Landican Cemetery, where her own mother and brother's remains are placed. D's name would then be entered in a book of remembrance at the cemetery.
14. AB has been supported in the petition (practically and, I believe, financially) by Wirral Council in the person of Ms Lisa Parkes, Cemeteries and Crematorium Manager.

Background.

15. The troubled history is relevant to the present dispute.
16. AB and JK met in about 1987 and never married. The relationship was to continue (with or without the disputed break in 1990) until 1997.
17. Sadly JK has become estranged from two of their three sons. Three grandchildren have been born to two of those sons.
18. JK and his present wife PK have been together since 1997, though they married only in 2018. Neither had been married before. They have two daughters aged 19 and 21.
19. AB met her present husband in about 1999. They married in 2004 and separated in about 2008. They have twins of 11 whom they have co-parented. AB told me they had reconciled in the last 18 months.
20. It is common ground AB's and JK's relationship was a troubled one. AB spoke of JK's violence and controlling behaviour; he of her 'numerous affairs'. That said, the relationship lasted most of a decade. Both denied much of the specific misconduct alleged against them.
21. AB was admitted to hospital for D's birth on 11th June 1991. D was, very sadly, still born on the 12th June. His mother required surgery under anaesthesia to remove the child and she remained in hospital until discharge on 18th June.
22. There is no dispute that JK (possibly alone of all AB's family or friends) was at the hospital to support her at the time of birth. Further, he was at the time responsible for the couple's son R, then just one year old. Unsurprisingly, JK was not present in the theatre during AB's surgery.
23. There is disagreement about the status of the couple's own relationship at that point and as to whether or not JK knew, and as AB asserts, acknowledged, he was not D's father. JK stated paternity had never been in issue between them.
24. Both appeared to have been somewhat traumatised by events. AB spoke of being in a 'daze' and of being unable to plan, let alone consent to, arrangements for D's burial. Her understanding, she explained in evidence, was that D might be buried 'with other children', possibly arranged by the hospital, in a 'paupers' grave'. The couple was certainly anxious about likely funeral costs.
25. On the 14th June JK took steps to register D's stillbirth. AB says this was done without her knowledge or consent. D was given JK's surname and one of his forenames. The 'Mother' section of the form was accurately completed with details of AB. The 'Father' section was left blank, a matter to which AB has since sought to attach much weight.
26. Further, in the section headed 'Informant', under the rubric 'Name and Surname (if not the mother or father)', JK entered his full name, and under the rubric 'Qualification' was entered

'Present at the birth'. It seems likely an official would have completed this important document upon JK's instructions.

27. JK also, on the same day, the 14th June, applied for the purchase of the plot in question. This was duly approved by Wirral on 24th June, the day of the funeral, and D's remains were interred following a short service of some kind attended by JK and AB and conducted by funeral directors JK had engaged.
28. There are disputed issues between the parties as to whether or not JK sought to obstruct AB's opportunity to see D's remains at the hospital and, later, at the Funeral Directors' premises.
29. AB alleged that a 'number of years' later her sister had informed her she had in fact offered to have D buried with her son, but JK had rejected this – something he denies.
30. It is accepted cohabitation resumed following the funeral, the couple had two further sons and the relationship continued, not without its difficulties, until its conclusion in 1997.
31. Its aftermath has been characterised by, amongst other things, cross allegations of parental alienation of the children.
32. Both AB and JK have visited the grave regularly and its physical state at various points has also been the subject of conflict between the couple.
33. The petitioner said that in 'late 1998, early 1999' JK had attended a local stonemason and, without her knowledge, selected a headstone for the grave. She said it was not one she would have chosen. In the event, a lack of finance appears to have prevented progress with any memorial.
34. In 2002 AB said she visited to find, to her distress, the grave had been 'spray painted black' and a 'black gnome' had been placed on the plot.
35. JK accepted in evidence he had arranged the placement of a gnome at a cost (to him) of some £275. He complained it had been removed by someone and said he had reported the theft to police at the time. He denied applying any paint.
36. He claimed that, over the years, he had placed many items (wooden crosses, boxes for flowers, flags, windmills) which had mysteriously been removed. He said he had, as a result, made a number of police reports. None was produced at court.
37. In June 2003 AB said she had left a large bouquet at the grave for D's birthday. Her son had reported to her a 'few days later' the grave had been 'spray painted red' with what she suspected were Liverpool Football Club colours. JK denied responsibility.
38. AB said that in 2007, when she was giving thought to a possible memorial, she first came to have sight of the stillbirth certificate and to learn that JK was sole owner of the grave. She was indignant that any question of his permission might be required for her chosen memorial and equally indignant to discover (again, she said, for the first time) that D's registered surname was as JK's. That, I confess, sounded improbable.
39. Some years later and following correspondence by AB with the General Register Office (which evidently considered it unnecessary to consult JK) a 'marginal note of correction' was, on 18th October 2016, added to the Certified Copy of an Entry of Still-Birth to amend D's name by omitting JK's forename and substituting AB's maiden name as the surname.
40. Reports of difficulty at the grave itself continued.
41. AB claimed flowers she left had heads snapped off, only to be rearranged in the shape of a circle or heart; cards left in 2012 for D's birthday were 'ripped up' and left on the grave; windmills, toys and rabbits she had placed were (at various times) removed.
42. In 2014 she was distressed to visit the grave to find it had been 'covered in clay'.
43. In 2015 (unauthorised) stone chippings had appeared along the full length of the grave.

44. These, JK explained, had been placed by the parties' eldest son R in a well intentioned effort to improve the grave, which looked neglected and in poor condition and had become a source of distress to JK.
45. On 6th July 2018, AB claimed flowers in a vase, with a card, which she had left for D's birthday, had been removed from the grave and placed to its left hand side.
46. Save for the removal of dead flowers, JK denied he had ever removed anything from the grave.
47. Finally, on the 18th September 2018, AB attended to find a (again unauthorised) wooden structure of low set kerbs and ropes, marking off the boundaries of the grave. JK accepted in evidence he had placed this hand-made wooden structure in an effort to make the grave look less 'unattended'.
48. Ms Parkes had first become aware of the grave when JK approached her in 2009, wishing to discuss transfer of his exclusive burial rights to someone in the United States. In the event, this was not pursued.
49. In 2010 Frank Field MP made contact with the Council on behalf of AB, one of his constituents. The enquiry was directed towards the possibility of shared ownership of the grave. Correspondence and several meetings took place with the parties separately but agreement proved elusive at that time.
50. Later that year preparations were made for a petition to exhume which, in the event, was not pursued – possibly for financial reasons. JK instructed solicitors who, on 22nd November 2010, made clear any application would be opposed.
51. In July 2011 JK met with Ms Parkes and indicated willing to share ownership of the grave. AB accepted this offer then, but no further action appeared to have been taken to the present to bring this about.
52. Ms Parkes was, during 2016, further apprised of developments and the changes approved by the General Register Office. The Council's position was that, without the certificate in fact produced by JK, it is unlikely consent would have been given either for purchase of the plot or indeed for burial arrangements to be made. Given that the law required registration of stillbirths within 42 days, Ms Parkes told me she had considered the timings 'suspiciously short'.
53. Further contact was made with JK by the Council in 2018 in an effort to avoid exhumation. He was offered an alternative grave in exchange for the transfer to AB of D's grave. He declined. AB, supported by the Council, felt reluctantly obliged to pursue the current petition.

The Law

54. It has long been established that the court has a discretion to permit exhumation, but the starting point in exercising that discretion is the presumption of the permanence of Christian burial.
55. Burial symbolises the entrusting of a person to God. It is meant to be final. Burial speaks of letting go and moving on, of fully and finally committing the remains of one's loved ones to God in the hope of resurrection.

56. Exhumation is, thus, to be exceptional and the court must determine in any particular case whether there are exceptional circumstances justifying the taking of that course.
57. The burden of establishing the existence of such circumstances rests on the petitioner in the case in question.
58. The key principles are to be found in two appellate cases: **Re Christ Church, Alsager [1998] 3 WLR 1394** and **Re Blagdon Cemetery [2002] Fam 299**.
59. The test to be derived from **Alsager** is: 'Is there a good and proper reason for exhumation, that reason being likely to be regarded as acceptable by right thinking members of the Church at large?' (p 1401 D-E).
60. That in **Blagdon** is that 'a faculty for exhumation will only be exceptionally granted.....whether the facts in a particular case warrant a finding that the case is to be treated as an exception is for the Chancellor to determine on a balance of probabilities' (see paragraph 33).
61. The Court of Arches in **Blagdon** set out a number of instances of matters (including, for example, where a 'mistake' has been made) which could be capable of amounting to special circumstances justifying exhumation.
62. It is also now fairly well established that in rare cases the fact that the presence of remains in a grave has become the cause of distress or conflict is capable of being an exceptional circumstance justifying exhumation (see, for example, **Re X (2002) 6 Ecc LJ 413** Hamilton Ch.; **Re St Ann, Rainhill (2004) 23CCCC 4** Hedley Ch; **Re St Mark, Worsley (2007) 9Ecc LJ 147** Tattersall Ch.; **Re ST Paul, Fazeley [2016] ECC Lic 4** Eyre Ch.; **Re St Mary, Haseley (2009) (unreported)** Eyre Ch, and **Re the Cremated Remains of AA [2018] ECC Lic 7** Eyre Ch..
63. At paragraph 13 of the latter, Eyre Ch. said: 'Each case must be considered on its particular circumstances with the court remembering the force of the presumption of permanence and taking care not lightly to regard considerations of distress as being exceptional circumstances for these purposes.'
64. Plainly, it will always be of concern to the court that any grave has become a focus of disquiet, acrimony, distress, conflict or grievance for the immediate circle of the deceased person. Frequently, as in the present case, the situation may be contributed to, if not caused by, some actual or perceived pre-interment administrative error.
65. The lapse of time, whilst unlikely in itself ever to be determinative, is, especially in the absence of a credible explanation for the delay, nevertheless a significant factor which requires consideration (see **Blagdon**, paragraph 36(ii))

The proceedings

66. I dispensed with public notice of the petition and directed special notice to JK. I was entirely satisfied, even absent determination of paternity, that he had sufficient interest to be heard.
67. Anxious about what I had been informed may be vulnerability on the part of AB and JK, I conducted a brief case management hearing involving the petitioner alone, by telephone, on 18th September 2018. I gave case management directions on the 23rd October 2018 and on 30th November 2018. I did not consider the matter suitable for hearing upon written representations and held a hearing at St Mary, Upton, a venue convenient to the parties, on 1st March 2019. Neither party was represented.

68. In addition to statements and documents from the parties, I had statements from Ms Parkes, from one of the parties' sons, JK's two daughters, his mother, and two friends or neighbours of the petitioner.
69. I heard oral evidence from AB, Ms Parkes and JK and submissions from the parties. I permitted JK's wife (with the petitioner's agreement) to supplement the closing submissions of her husband. He had plainly found it exceptionally difficult to articulate at the hearing the nature of certain mental health difficulties he accepted he had. His wife threw welcome light on these sensitive matters.

The Oral Evidence

70. What struck me forcibly throughout was the unresolved, even raw, nature of the grief AB and JK continue to experience connected to D's death, even after so many years.
71. AB continued to feel indignant that hasty, unilateral arrangements had been made at the time of death without her consent; by someone she insisted was not D's father; that D had not been buried where she believed he was to be buried; that the grave is solely 'owned' by JK; that she has been unable, for years, to tend it unhindered and without repeated removal of items she has placed; that, in law at least, JK's present wife has greater 'rights' to D's grave than she has.
72. She spoke emotionally of being D's 'only voice' now. She believed he belonged 'with his family'. She blamed JK for being responsible for repeated removal of items she had left at festivals, D's birthdays etc.
73. She felt she 'could not go to the cemetery', that JK had 'tarnished' it for her, that D could not 'rest in peace', and that the situation was adversely affecting her mental and physical health.
74. Whereas in the recent past she might have considered 'shared ownership', her stance in all the emotion of the hearing was that this offered no real solution.
75. Her resentment of JK's role (past and present) was palpable.
76. JK left me in no doubt of his deeply held conviction he was D's father. He sought, for the first time in his oral evidence, to explain his failure to complete the 'father' section of the still-birth certificate as being due to the parties saying they were not living together in order to secure separate benefits claims: 'that's how it was in those days...'. He added, again with some conviction, he would 'not be doing this (ie contesting the proceedings) for someone who is not my baby'. He described the family history and the birth of other children. He denied there had been the separation AB suggested.
77. In addition to his account of placing many items on the grave, and of those being removed, he described, disconcertingly, how, on maybe 'a hundred or more' nights he had slept on or at the grave, 'curled up' in the open air.
78. He said this had been discussed with police who had considered they 'had no grounds to stop him'. He described how such stays helped him feel 'peaceful...warm and relaxed'. He thought the last such stay had been '3-4 months' ago; his wife thought it more like a year.
79. He denied he had interfered with anything left on the grave by AB. He had removed dead flowers. 'Rabbits' had eaten other flowers left at times, including his own. He insisted he would not remove things which had been left: 'they are my son's...I respect what's left'.
80. He agreed that when he had acquired the plot he had envisaged it becoming a 'family grave', but that was now no longer any possibility. He said he had no plan to be buried there himself or for anyone else to be buried there: 'I don't want strangers in there'. He said the plot was part of his 'past life'. He was willing to undertake to have no one else buried in the grave. He

was willing to be party to a document to enable shared ownership with AB. He was willing for them both to look after the grave.

81. He said exhumation was unnecessary, even 'disgusting'. It would, he said, 'rip me to bits', 'take me over the edge'; 'You can't bury him twice'; 'it scares the hell out of me'.
82. JK explained he was 'under a psychiatrist' and in receipt of medication. He had not worked for some years. He was adamant he did not feel able to amplify his difficulties. His wife was of great assistance in that respect, and he dissented from nothing she later told me.
83. Mrs K explained that JK had had mental health difficulties from childhood. D's death and the loss of contact with some of his other children had triggered greater difficulty. Four to five years ago, PTSD, psychosis, personality disorder and even early onset dementia had been diagnosed. Two years and eight months ago JK had been 'sectioned' and spent some twelve days undergoing rehabilitation for his problems. Mrs K said he had made considerable progress since. He was, indeed, seeing a psychiatrist and was 'medicated'.
84. She was resigned to his tendency to sleep on the grave and described occasions in the past when police had brought him home.
85. She considered he had made 'great progress', 'come far', since his hospitalisation. Her main concern, she explained, was that, if granted, exhumation might 'set him back', might 'cause severe mental health problems'.
86. Mrs K expressed her concerns moderately. She struck me as genuinely concerned. Of course, I had no medical reports about either party – a distinct evidential disadvantage in this case – but I had no reason to doubt the truthfulness of Mrs K's broad description.
87. Ms Parkes has been employed by Wirral since 1992 and is now the Cemeteries and Crematorium Manager. She struck me as an experienced, competent and compassionate professional.
88. Landican Cemetery, which opened in 1934, is the largest in Wirral, embracing some 29 hectares. It receives some 750 burials per annum. Of existing consecrated space, some 95% is occupied. There are no plans to create additional consecrated space as such.
89. From 1989, regulations had prescribed 'lawn' graves with headstones. Chippings, surrounds and the like are not permitted, though Ms Parkes was candid enough to concede that staffing levels meant that unauthorised additions, not considered unsafe, were unlikely in practice to be removed by staff.
90. Vandalism had not been an issue of any significance in the cemetery.
91. She supported the petitioner's request, explaining the Council had sought to do everything possible to broker a solution to avoid the need for exhumation. Her view was that the continuing situation was affecting the petitioner 'a lot'. AB was constantly in touch with the cemetery. She was aware she had seen her Doctor. I shared Ms Parkes' view that AB 'hasn't completed grieving'.
92. As to records of complaints, Ms Parkes said that pre-2012 records had been disposed of and only incidents of 18th June and 6th July 2018 were reflected in any written record.

Discussion

93. The court is faced with an unenviable exercise of discretion, the outcome of which is inevitably likely to be a degree of further distress and disappointment to the petitioner or the party opponent.

94. Both parties are, I have concluded, highly vulnerable and have a number of unresolved psychological and grief-related issues which trouble them. Each needs to be well to cope with their existing responsibilities as spouses, parents and grandparents.
95. D's memory is not honoured by the unedifying dispute they have evidently persisted in for the last two decades. It has all gone on too long. It must now end.
96. I found neither party to be an entirely reliable witness or historian of events. At various points, there was a selective vagueness apparent which made the attempt at fact finding tricky.
97. I think it likely JK did 'take over' somewhat insensitively at the time of D's birth, and pressed on with funeral and other arrangements with scarce regard to AB's physical and mental state at that sad time. I found myself asking why he might go to such lengths to make arrangements in respect of another man's (dead) child. Perhaps an explanation is to be found in an attempt to save face, to assert 'family solidarity', when he had been betrayed by AB in an affair.
98. Equally, however, I found AB's account of the separation, the affair with an unnamed individual, and the subsequent eight years of family life (with the birth of two further sons), in part at least, unconvincing.
99. Even if JK, not the father, had rushed to cover his embarrassment at the time of D's death, and taken unfair advantage of AB (and the Council who sold him a grave), his continued visiting of the grave for approaching 28 years (and the intensity of those visits) is perplexing, to say the least.
100. I have concluded that it is likely each has, at various times, removed items from the grave they suspected the other had placed. In some instances that will, I accept, have been in the interests of trying to care for the grave and tidy it; in others, I suspect, the motivation will have been irritation or even resentment.
101. The arguments favouring exhumation are that it will undoubtedly comfort AB to know she has 'sole responsibility' for D's remains, that they, once cremated, will be placed with other members of her family in a rose garden where the question of depositing items on a grave seems unlikely to arise and where D may truly rest in peace, free from the focus of conflict the present grave represents. AB will then be free to visit the place of burial undisturbed and freed from anxiety and, thus, to achieve some greater measure of 'closure' in connection with her loss. Further, D's removal will free the entire grave for JK and his family to use in the future, or dispose of as he wishes.
102. The arguments against exhumation are that it is unnecessary and, at this very lengthy remove in time, simply inappropriate as a means of resolving the disagreement of vulnerable adults who, with even a little goodwill, ought to be able to cooperate in memory of a still-born child who has been, at the very least, part of their shared history.
103. JK offered assurances he proposes no further burials in that grave. He has repeated in court his readiness to enter into legally binding shared ownership arrangements (a solution previously offered by the Council). With appropriate help, simple ground rules between the parties for the visiting of the grave and the placing of items should be entirely capable of negotiation.
104. It was far from clear to me that the 'rose garden' option would, in any event, bring the conflict between these parties to an end and, having heard from JK's wife, I cannot pretend that I was not left very anxious indeed about the impact upon his (reportedly improving) mental health of permitting exhumation.

105. Absent medical evidence, my concern can, of course, merely be impressionistic, but I had no doubt about JK's wife's anxiety on that front.
106. I have concluded in the exercise of my discretion in this particular case not to permit D's remains to be exhumed. I know this may upset AB and I regret this. I hope she may come to accept my decision and at least consider the course I suggest.
107. The balance of factors leads me to conclude exhumation is unnecessary. Too much time has elapsed. The unreasonableness of any misconduct here (on either side) is not, in this case, of an order which I conclude displaces the presumption of permanence in burial.
108. D was laid to rest, with both AB and JK present, on 24th June 1991. It was a sad time for everyone.
109. Each is now free to honour D's memory- in their hearts and minds- as they wish. True it is that the grave itself is owned by JK, but he has indicated an unequivocal readiness to place it in joint names and has no plans to add additional remains at any time. The petitioner has been open to accepting an agreement of that kind in the past. Although she rejected it in the emotion of the hearing, I urge her to reconsider and (perhaps with the help of Ms Parkes and JK's wife) to seek to negotiate a mutually acceptable memorial to D (which could be very simple) and to agree some equally simple 'ground rules' by which each could abide in connection with the grave. I am not persuaded all reasonable steps to compromise have yet been exhausted.
110. The petition is therefore dismissed.
111. The petitioner must, in the usual way, pay the court costs of and incidental to the proceedings. There will be a correspondence fee to the Registrar.
112. I believe in this case the Council may be assisting AB with costs. That is, if I may say so, enormously to their credit and I express gratitude for all Ms Parkes has endeavoured to do to assist these parties. I hope I may rely on her goodwill for a little longer in the attempt to broker compromise along the lines I have suggested.

David Turner

11th March 2019

His Honour Judge David Turner QC
Chancellor of the Diocese of Chester