

In the Consistory Court of the Diocese of Derby

In the Matter of Cubley, St Andrew, and

In the Matter of a Petition dated 19th July 2019 presented by Mr David Alan Redfern, seeking the exhumation of Mrs Ida Margery Lewis (nee Redfern)

Judgment

Introduction and summary

- 1) For convenience, I will generally refer to individuals by their first names and without titles; no discourtesy is intended. The case concerns yet another petition for exhumation, but the circumstances are unusual.
- 2) By a petition dated 19th July 2019, the petitioner, who lives outside Uttoxeter, seeks permission to exhume the body of his late aunt from his father's grave (her brother) at St Andrew's, Cubley. I am unaware of her exact age, but believe she was probably in her late 80s, or older. David is 72. His mother, Barbara Gwendoline Redfern, is still alive and is in her late 80's. His father, Francis William Redfern, died in 1980, at the age of 63, and was buried in a single grave at Cubley. I am not told why that course was taken, save that it was so no one else could also be buried in the plot, although that is not really any explanation. I am told that Barbara and David wished to place a memorial stone on his grave, but their proposal was for black granite and the application was refused. The only memorial stone - ('A Dear Brother') - in fact placed on the grave was arranged and paid for by his surviving brothers and sisters - originally it was a family of 12 siblings - and it did not refer to his widow or son. Barbara and David were concerned by the placing of this stone without consultation with them, and met with the siblings, and the then incumbent, but in the end the matter went no further. Ida Margery Lewis ('the deceased') is one of Francis's siblings and it seems that she lived at Cubley for many years in the earlier part of her life, but for a number of years past she lived with one of her sons, Edward, at his home in Uttoxeter. Unhappily in the last few years, Mrs Lewis suffered from the symptoms of dementia. Of the 12 children, who are shown on a family tree prepared by the petitioner, I believe only Joan now survives.
- 3) Mrs Lewis died on 21st April 2019, and Edward had the responsibility for arranging the funeral, along with his brother John. Edward was named as executor in Ida's will along with her niece's husband. Their sister, Jayne, who lives in Somerset, was apparently kept informed as arrangements for the funeral were put in hand, but took no active role in them. In her will, of which I have an extract but no details as to when it was made, Ida had made clear she wished to be buried at St Andrew's although she specified no particular location beyond that. Steps were initially taken to see if a new grave could be made available, but as only a few spaces were available, the wardens and Associate Priest, Rev'd Jane Legh, were not willing to agree to that and Ida's sons then suggested she be buried in the grave of her brother, Francis. The funeral director, Mr Lee Field, established that that was physically possible. The funeral was on 7th May, and conducted by a Reader.
- 4) Mr Redfern's petition is based on the contention that neither his mother nor himself was approached about the burial in Francis's grave, as they contend they should have been, and so neither gave permission for it to happen. If they had been asked for permission, they would have refused.
- 5) David attended the funeral of his aunt, but did not go into the churchyard for the committal of Ida's body into the ground. At the wake afterwards, Edward said to him words to the effect: '*We have put my mother's coffin on top of your dad's*'. David was very shocked and upset, as was his mother, (who had not attended the church), when he went to tell her. He, on his own and his mother's behalf, complained promptly to the church, the Associate Priest, and the funeral directors, Field Funeral Services. Eventually, the petition was issued in the usual form for an exhumation.
- 6) In reality it should also seek an order that Edward and John, who arranged for the funeral as Field's clients, do restore the situation at their own expense, ie by arranging for the exhumation, and being responsible for any costs relating to the petition or otherwise. As it stands, the petition makes no proposals as to where Mrs Lewis's remains should be re-interred following the proposed exhumation, it obviously being assumed that any decisions about that, and the practical arrangements, should fall to be determined by Edward, John and possibly Jayne. The months since the funeral have not lessened the sense of anger and outrage felt by

David and Barbara at what they regard as an unwarranted violation of Francis's grave, and at the failure to consult them and gain their approval.

- 7) In a letter of 26th August, the incumbent, the Rev'd Dr John Vickerstaff, has indicated his total opposition, along with the PCC, to the proposed exhumation, relying on the well-known policy of the Church of England to refuse all such requests, unless there are exceptional circumstances. The decision in the leading case of **Re Blagdon Cemetery [2002] Fam 299** makes clear that the Church of England's view is that it is intended that the place of burial be permanent and the final resting place of the deceased, as shown by the wording of its services, and the intention of the minister, and indeed what is intended by the family. It follows that exhumation may only be allowed in exceptional circumstances.
- 8) That limited basis for objection does not of course rule out any other possible bases for objecting, such as the sense of abhorrence that may be felt by many at the idea of disturbing human remains reverently laid to rest, especially if they are in consecrated ground. The Rector is also aware that he and the PCC would be plunged into the middle of a family dispute if he were to support the application, although he makes clear he considers there is no overwhelming reason to support it. The PCC do not consider, if an exhumation were allowed, that they could now agree to make space available in the churchyard for a re-burial. Certainly Ida's children are distraught at the idea her mortal remains should be exhumed, so that they will be unable to fulfil her clear desire to be buried in the churchyard at Cubley.

Procedural matters

- 9) Following my receipt of the petition and accompanying papers, that included statements from Edward and John, I wrote a lengthy Note rehearsing my understanding of what the various statements then available were telling me, and seeking to give a summary of the law relating to the right of burial. I also explained that a burial space, whether filled, or 'reserved' for future use, remained the 'property' of the church, that usually being vested in the incumbent, and that any monies paid to the church in respect of a funeral did not cause any change in ownership of the grave space, or create a lease, or anything of that kind. I thought it necessary to make these things clear as the initial statement from the petitioner in particular raised all sorts of false legal issues that would only confuse matters further. (It seems these clarifications by me have not been taken on board by David). I also expressed the hope it would be possible for David to speak with other members of the family, to explore if any way forward could be found which could bring this unhappy dispute to a conclusion. Nothing has come of that.
- 10) On 6th February I received further documents from the Registry, including other statements or letters from Edward, and a letter from Jayne, both of them expressing deep regret that the burial of their late mother in her brother's grave, should have caused such distress and offence. There were two copies of Form 5 whereby Edward and Jayne indicated they did not wish to become formal objectors to the petition but wished me to consider their opposition to the proposed course. There was also a lengthy explanatory statement from Rev'd Jane Legh, that I will refer to later, together with a document relating to the categories of those who could be buried at Cubley, that had been approved by the PCC in 2001. There was also an unsigned and undated letter on headed paper from the funeral directors, setting out their account of what had happened.
- 11) In the light of the further information and after giving the situation further thought, it seemed to me that in view of the expressed objections, it was not possible to adopt the approach usually taken in exhumation cases, namely of dispensing with the need for Public Notices under Rule 6.6 of the Faculty Jurisdiction Rules 2015. I accordingly invited the Registrar to draft appropriate Notices for display in the church and parish, giving opportunity for any members of the church or parish to express their opposition. Although this decision comes rather late in the day after the principal parties have already expressed their view that they do not want a hearing, and have all made clear what their respective positions are, I consider it is necessary to regularise the situation. The result was rather as anticipated. The notices were exhibited for 14 days only, on my direction, as I consider I am entitled to order under Rule 6.6(2)(b), until 24th March 2020 only, and no further objection was forthcoming.
- 12) It is established that before the court can avoid a hearing and deal with the matter on paper, the Chancellor must be of the view that it is expedient, and the parties consent. I recognise there are a number of issues that would doubtless become clearer if questions could be put to individuals who might attend such a hearing, but the main issues are reasonably clear and there are other considerations to bear in mind. The petitioner and Edward, who for practical purposes is representing Ida's family, have both indicated they do not wish to have this matter proceed to an oral hearing, but they obviously feel strongly on the relevant issues, and the subject matter is plainly very sensitive, and a hearing would be an emotional and upsetting experience for everyone. They must realise that one 'side' or the other will be disappointed and distressed

by the outcome, as set out in my eventual decision, because it is impossible to both grant the exhumation and refuse it, and there is no half-way house. In my view any additional clarity, which could be gained from a hearing, including possibly coming more firmly to a view on some issues of fact, do not warrant the upset and emotion such a course would engender. I therefore have ordered that this matter be resolved on the basis of the documentation available.

The clergy and parishes

- 13) The Rev'd Jane Legh gives me a lot of useful background in her statement of 11th December. She and her husband have lived in Cubley since 1979 and she is a Self-Supporting Minister. Her husband, David Legh, is one of the Churchwardens at Cubley, along with Jonathan Johnson. Cubley is one of the parishes in the South Dales Benefice, (which lies over towards the south-west of the Diocese close to the border with Staffordshire), and Jane is an Associate Priest there. She also describes herself as Interim Priest-in-Charge of the Longford Eight Benefice, which consists of that number of other small parishes, but these do not feature further in this matter, and I only mention it to indicate there were a large number of places of worship and worshipping communities, that must have taken up her attention. Back in April 2019 at the time of Ida's funeral, the Rev'd Dr John Vickerstaff, the Rector of the South Dales Benefice, was on a period of extended leave, and Jane, along with Rev'd Peter Jones, who holds a Permission to Officiate from the Bishop, were overseeing arrangements in the South Dales Benefice at the request of the Archdeacon of Derby and the Acting Bishop of Derby, Rt. Rev'd Jan MacFarlane.
- 14) Jane has supplied me with a document dated 11th May 2001 headed *Guidelines on Burials* that had been approved in 2001 for Cubley by its PCC (and possibly other parishes in the Benefice have similar arrangements). To an extent it reflects the general law relating to rights of burial in a churchyard of the Church of England, but it also goes beyond it and clarifies some matters, while inevitably introducing some further potential areas of uncertainty. It reads as follows:

- 1) *Anyone who resides in the parish, including those who die in hospital or a Residential Home is eligible.*
- 2) *Anyone who is on the electoral roll is eligible.*
- 3) *Anyone who has spent the major part of their working (active) life in the parish but has moved out of the village in retirement e.g to live with or near their children, into a Residential Home or into a smaller house nearby is eligible.*
- 4) *Anyone who has a husband, wife, parent or child already buried in the churchyard can be buried in the same grave.*
- 5) *Anyone who has worshipped regularly in St Andrew's church is eligible. [They are likely to be on the Electoral Roll unless they have ceased to worship at St Andrew's due to age or infirmity.]*
- 6) *Children with parents living in the village, who die before they are fully established in a particular place, especially before they marry, should be eligible for burial.*
- 7) *Anyone who, at the discretion of the incumbent and Churchwardens and who is not covered by 1-6 above if it is considered appropriate should be eligible.*

The Funeral Arrangements

- 15) I turn now to how the funeral came to be arranged and do so from the point of view of the church and the funeral director, Lee Field of Field Funeral Services, Tean, Stoke on Trent. The South Dales Benefice has an Administrator, Helen Bailey. On the morning of 23rd April, Lee Field emailed Helen saying that he had just met with Ida's family, she having passed away on the preceding Sunday (21st) in Queen's Hospital, Burton-on-Trent, and they had requested a service and burial in the churchyard at Cubley, to take place on 7th May at noon. He passed on information that Mrs Lewis had been born and lived most of her life in Cubley and her family members were all interred there. She had spent her last few years being cared for by her sons, John and Ted (Edward). The message was forwarded promptly by the Administrator to the two members of the clergy, Jane Legh and Peter Jones, and copied to the two wardens. Helen also noted that Mr Jones was away on 7th May, and so asked if she should contact two other ministers for their availability. She also asked whether the church was 'OK for a new burial' and 'Is the church OK for proposed date and time?'
- 16) Jane responded to the Administrator the same day, copying in Mr Jones and the wardens, indicating she was also unavailable on 7th May because of a hospital appointment, and indicating the wardens needed to discuss whether a burial at Cubley was appropriate, presumably in line with the *Guidelines* set out above. She indicated she herself had not heard of Mrs Lewis, although long a resident in the village, and asked that Mr Field be contacted for more details as to when and where the deceased had lived at Cubley. 'The

churchyard at St Andrew's has little remaining space.' Jane was apparently away in Norfolk with her husband, and intended to return on the 24th April. The Administrator passed on this message to Mr Field that afternoon. It is clear that the burial under consideration by Mrs Lewis's family, the funeral director and clergy, related at that stage to a new grave space.

- 17) On 24th April the funeral director provided more information to the Administrator, which she passed to the two wardens. This had presumably been obtained from one of the sons, Edward or John, and he reported that Ida *'had been born in Mill Cottage, Mill Lane where she had lived until she was no longer able'*. Her parents, two brothers (one of whom was Francis), and two sisters were already buried in the churchyard at Cubley. Jane responded to this further information, (presumably it having been passed to her by her husband) asking that the Administrator *'hold fire'* and promising an answer by the end of the day. *'We do not believe Ida can have lived in either of the Mill Cottages for 40 + years.'*
- 18) At about 5.20pm that day, Jane emailed the funeral director, copying in her colleague Peter Jones, and the Administrator, and also forwarding the 'self-explanatory' *Guidelines on Burials* to him. She indicates in her statement that *'we'* had consulted over the residency of Mill Cottages before she and her husband had arrived in Cubley in 1979, and that this consultation (presumably including the other warden) had confirmed the information provided by the family was *'plainly false'*, and stating that Ida had not lived in the village after her marriage, certainly not at the Mill Cottages. She asserted: *'The Redferns left Cubley Mill Cottage sometime in the 1960's, well over 50 years ago.'* She asked that in future more information be provided in similar cases, and pointed out that since the *Guidelines* were produced in 2001 *'the churchyard has filled considerably, as have many others in the area.'*
- 19) I do not have any other specific email or record of the decision being passed to Mr Field that it was not possible for Mrs Lewis to be buried at Cubley, it seems clear that that decision had indeed been reached by the wardens and Jane, and was communicated to and so understood by him, and that he passed it on to Ida's sons. In response to Jane's email of 24th April, Mr Field wrote (and although I do not have a copy of this email, the following is quoted in Jane's statement): *'Family would like Ida buried with her siblings. I will depth check the graves this afternoon and make the necessary arrangements'*. In his undated statement and in answer to a specific query from me, Mr Field indicates the family wanted Francis's grave to be tested, rather than those of other siblings, as Ida had been particularly close to him. Mr Field was present when the gravedigger carried out the rodding, and established it would be possible to use Francis's grave for Ida's burial, without interfering with Francis's coffin, (despite it having been originally only a 'single' grave).
- 20) On 26th April, Mr Field wrote to the Administrator: *'I completely understood the decision on a new grave but the family have decided to bury Mrs Lewis with her brother Francis in the churchyard; I have informed Reverend Jane Legh.'* In a later conversation between Mr Field and Jane, according to the latter's statement, he asserted: *'All the family were happy'* with this arrangement.
- 21) In his undated letter addressed, I think, to me, in response to my initial Note, after outlining his contacts with Edward and John, Mr Field says: *'Just a few days before the proposed funeral I was made aware that the ex-partner of (Francis), who I was told was estranged from (him) at the time of passing was not informed of the arrangement as they did not have any details. I advised the family to make enquiries and I was led to believe that Mr David Redfern, (Francis Redfern's son) was informed and would be in attendance'*. The only person(s) who could have provided this information to Lee Field were Edward and John, but I am not persuaded this is an entirely accurate account, either as to whether or when the funeral director was alerted to David's and Barbara's existence, or what is said to have been said to Lee by the sons in response to his advice to make enquiries and let David know about the proposed burial in his father's grave.
- 22) I understand that the funeral service was conducted on 7th May by a Reader. Her prior involvement with Edward and John, in the absence of any of the clergy, would in all likelihood be limited to gaining some knowledge and information about Ida and the wider family, to inform what she intended to say in her address, rather than concerning herself with specific details relating to the grave.
- 23) The decision that Ida could be buried at Cubley was in the result taken, as far as I can see, by the wardens and Jane, which, in the circumstances of Dr Vickerstaff's absence, amounted to the Incumbent and wardens, as the parish *Guidelines* envisaged. It is unclear which paragraph in the *Guidelines* was accepted by them as applying to the situation - probably the final one, the residual discretion, although that does not refer specifically to the opening up of an existing grave. It seems there was a general desire among the wardens and Jane, not to reduce the number of available spaces for those with an undoubted right of burial, which they had decided Ida no longer had, and a solution apparently acceptable to the wider family, of burial in a relative's existing grave where there was room, was seen as an acceptable solution.

- 24) The petitioner spoke to Jane Legh on the day following the burial and complained that his aunt had been buried in his late father's grave without his consent. Jane confirms she had not previously been aware of his existence. David told her he had made enquiries with the funeral directors involved with his father's funeral and confirmed with them that Francis's grave had indeed been a 'single' grave. The petitioner later visited her at home - on 17th June - seeking a letter consenting to the exhumation for which he was applying to the Registrar, and she gave him the information to enable him to make contact with the Rector, Dr Vickerstaff. The latter's views are set out at paragraph 6 above.

Proceedings

- 25) The petition is dated 19th July. It makes clear that the Lewis family object to the proposed exhumation. In response, **Edward** wrote to the Registrar on 14th August (a copy being passed to the petitioner by her). Edward refers to the burial *'with her dear brother Francis. As per her final wishes, if a single burial plot was not granted, she wanted to rest with Francis, if at all possible as she knew it was a single grave and chances were probably remote'*. He goes on to say after a new single grave was refused, *'After speaking with Redfern family members who we do have contact with, it was agreed that mother should be buried with her closest brother Francis as they had always been very close to each other'*. He contends *'we had no contact details for Barbara or David Redfern as they distanced themselves from the family after Francis passed away and moved from Cubley leaving no one with new contact details. I had no way of contacting them to inform them of the funeral or proposed burial plans to which the church had agreed could proceed (sic)'*. He had no direct contact with church officials, the funeral being organised between the funeral director and church.
- 26) Edward states he had no intention of (causing) upset or distress to Barbara or David, and apologises unreservedly. He thought all concerned had been notified and agreed, and was dumbfounded to receive the application for exhumation. Edward agrees he spoke to David at the wake and says David raised no concerns and did not tell him (Edward) they were uninformed of his mother's interment, so (the proposal for exhumation) had come as a complete shock to them all. Edward makes clear his mother wanted to be buried with other family members at Cubley, and expresses the upset to the remainder of the wider Redfern family if there were to be an exhumation. Edward's statement is also signed by his brother, John.
- 27) In an undated letter to Edward, the surviving member of the original 12 children, **Joan Burgess**, agrees with his statement, and refers to his siblings laying a stone on Francis's grave. She contends that his family (ie the Redferns, not including his wife and son), looked after Francis's grave. This reflects something Edward also says.
- 28) Ida's daughter, **Jayne Lewis**, wrote a brief note to the Registrar on 15th August, saying *'to the best of my knowledge Edward Lewis's account is true and accurate'*. While I accept her truthfulness in making that statement, Jayne was not involved in making the arrangements for Ida to be buried at Cubley, and could only know what was going on from what Edward chose to tell her.
- 29) Mrs **Anna Bebbington**, the petitioner's daughter, wrote a longer letter to the Registrar on 18th July in support of the petition. She had been supporting David and her 'nan', Barbara, during the previous months at this *'very distressing time'*. She points out that Edward clearly knew of her father and grandmother's existence, but failed to make the funeral directors aware. She says that when David contacted Fields they were *'amazed at our existence'*. The failure to notify Fields had led to *'this horrendous distressing situation for us all.'* She refers to David's cousin, **Vivian Marsh**, (who must be a child of one of the other siblings), who, she says, they were in contact with and exchanged gifts and cards with, and who updated them on family affairs. Vivian had notified them of Ida's death, and David and Barbara could have been contacted through her. Anna lost her grandfather Francis when she was 3, but says she had (later) tended his grave and left wreaths and crosses there. She had lived in Cubley during her childhood and maintained friendships there, people who could have provided information as to David and Barbara's whereabouts. Anna indicates that visiting her grandfather Francis's grave with someone who was a stranger to her now buried in it, would be distressing.
- 30) **David** also wrote a letter to the Registrar on 18th July in response to the correspondence from the Lewis side, and that letter was also signed by **Barbara**. Since his father died, he says, none of his brothers and sisters had kept in touch, before Ida died. He attended her funeral out of respect for the Redfern family, but had not gone to the graveside. I have already indicated how he learned Ida had been buried in his father's grave. When he complained to the churchwarden, and to Field's, the latter were *'mortified'* to discover his and his mother's existence. He contends the churchwarden indicated to him he had been told by Edward and John, that David's parents were estranged, that Francis had said he did not want Barbara to be buried with him, and that all the Redfern family had agreed to Ida's burial in Francis's grave. Ida

was reported to the warden to have lived in Cubley until recently, whereas (David says) she had not done so for at least 70 years.

- 31) David further contends also that one of his cousins (unnamed) had said to him she had raised with them (the Redfern/Lewis family) before the funeral the need to speak with David and Barbara about the opening of Francis's grave, and they, presumably Edward and John, had chosen not to do so.

Further documentation

- 32) Further documents were provided to me in the early part of 2020. These included Rev. Jane Legh's letter, the various emails that had passed, and the *Guidelines*, to which I have referred in detail above. I will take them in order, dealing first with **David**. I shall offer comment on his assertions, so he can be assured I have considered all his areas of complaint.
- 33) David wrote to the Registrar on 17th September 2019 and he comments on the letter from Edward and John of 14th August, contending it contains many '*discrepancies*'. He contends the Lewis family could not know Francis's grave was a '*single*', that was something known only to him, his mother and the original undertakers. I can only say that I think he is wrong about that, but I cannot see in any event, that it bears greatly on the case. It was indeed a single depth grave but it was established there was room for a second burial at the proper depth above the first. There is no indication of Francis's coffin being moved or lowered to enable that, (a step that would have required faculty approval in itself). I can see that the thought of the rodding that was undertaken, could cause distress, and I accept that that procedure has done so here, but it is a procedure frequently adopted to check for the presence of previous burials, or structures or possible voids, or the depth at which any previous burials may lie, in connection with other proposed burials or, indeed, building works of some kind in the churchyard. There may be times when such an extensive investigation of that kind needs to be made, or other circumstances, when an interim faculty should first be obtained to sanction the procedure, but it is frequently done without that, and often, although not always, only with the express or implied permission of the clergy. It is not an issue at the heart of this case, and I will say no more about it.
- 34) David contends his mother, Barbara, did not move from Cubley after Francis died, as the Lewis brothers assert, and continued to live in Cubley for 34 years after her husband's death, i.e. until 2014, before moving to nearby Doveridge, and she keeps in touch with a former warden at Cubley.
- 35) He disputes the Lewis family's assertion they have maintained Francis's grave. I do not consider this dispute can or will bear on the resolution of the underlying issues, and I do not find it necessary to resolve the matter.
- 36) According to David, in his conversation after the burial with Lee Field, it seems clear there had been no mention by Edward or John to Fields of David or Barbara's existence. Mr Field's contention that he had heard mention of them prior to the burial and had advised they be contacted of course runs counter to that, but I am doubtful of what Mr Field says, and it seems to me clear the brothers had kept quiet about them.
- 37) David repeats his account of learning at the wake where Ida had been buried, and says he walked out, but was immediately approached by his cousin, **Melanie Redfern**, '*who informed (me) that she had told many of the Redfern/Lewis relatives that my mother and I should have been informed before the funeral regarding the Lewis family's plans regarding my father's grave*'. Edward and John had failed to do that, even though he and his mother are in the phone book. He indicates that their failure has led to other members of the family refusing to support the brothers in their opposition to the exhumation. If they had approached David or his mother for permission for Ida's burial, it would have been refused - it was not a '*family*' grave and they have '*exclusive burial rights*'. They had expected his grave would never be disturbed. I will return to that contention later.
- 38) He blames the '*church*' for bringing about '*this awful situation*' by failing to follow the correct procedures and protocol in establishing '*ownership*' of the grave and obtaining the necessary permissions. I will also return to this later.
- 39) He also relies on advice he has had from a group he identifies as '*The Ministry of Burials Team*', to whom he had spoken previously. I confess this is not an entity I know of, nor whether it is a diocesan or national body. Insofar as he had set out their advice in his earliest correspondence, I addressed that in my initial Note, and felt obliged to disagree with a number of legal submissions he had set out. He again says he was told by the group's Richard Finlay that as they '*had bought the burial plot...they have exclusive rights of burial (and) that the burial of Ida Lewis in his opinion (i.e. Finlay's) is an illegal burial*'. David continues to rely therefore on propositions I had been at pains to correct; these assertions are wrong as a matter of law, as I set out below. This group, whatever its basis, does not have the role of determining petitions for

exhumation, or ruling on disputes about churchyards, in the Diocese of Derby. That is my responsibility as Chancellor.

- 40) **Edward** returned the copy of Form 5 dated 5th December indicating he did not wish to become a party but wanting me to take his objection into account. Of course, this will be done. The Form was accompanied by a further letter of the same date. It contains a fulsome apology for the upset he has caused because he *'wrongly assumed that Barbara and David...had given their consent for the burial, after the funeral director telephoned...with the news that permission had been granted.'* He expresses willingness to meeting David in person to try to resolve the situation, but begs for *'compassion, love, and forgiveness'* to drop their *'appeal'*.
- 41) There is also a similar Form 5 of 7th December from his sister **Jayne**, also with an accompanying letter. She makes clear that her understanding of events came from Edward, as I had assumed. She indicates that this was a very emotional time for all, particularly as Edward had cared for his mother for 14 years, of which 8 had been when she had been suffering from dementia. Jayne too asserts Ida wanted to be buried with Francis. She had accepted that all necessary parties had consented, (but is unsure who those might be). *'There was nothing whatsoever malicious or underhand on my or my brothers' part in Mum's burial. Maybe we were naive or just so emotionally exhausted that we did not think things through properly'*. She is very sad at the prospect of her mother's being exhumed, and sad also at people being hurt.
- 42) The final document is another letter from **David** dated 26th January. He says he has been in touch with members of Cubley church, friends of Barbara in the village and Redfern family members. He expresses amazement how plans to bury Ida in his father's grave could have been made without contact with, and permission from, *'the closest relatives'*, and how her children pressed on when they were told it was a single grave. He asserts again that his parents were not estranged, and will not accept excuses, blaming the funeral director, or any apology. He and his mother wish to continue with the exhumation application. There have apparently been no steps taken, either way, for contact between Edward and John, and David and Barbara.

Findings

- 43) What conclusions do I draw from a consideration of the above contentions?
- i) I am satisfied there was no contact with Barbara or David about the proposed plan to bury Ida in Francis's grave, prior to the funeral, and that the news that had happened was a great shock to them both. I have no reason to disbelieve David's contention Edward informed him at the wake. Why he would have mentioned the matter then, if he really believed David and Barbara had already given their agreement, I cannot imagine.
 - ii) I also find that Edward and John were aware of Barbara and David's existence as Francis's closest relatives, and they made no efforts to trace them, (if they were indeed unaware of their whereabouts), either through other family members (their cousins) or other people who would be likely to have contact details. I accept David's contention (hearsay as it may be) that a cousin, Melanie, had told him she had advised Edward and John before the funeral that David and Barbara should be contacted about the proposed burial.
 - iii) I apprehend Uttoxeter is a town of modest size, and it seems to me unlikely that when David lives at Rocester some 4 miles north, and Edward in Uttoxeter, that David's address was unknown to him, or could not have been ascertained relatively easily; I am satisfied no efforts were put in hand to make sure David and Barbara knew of and agreed to the plans.
 - iv) I am not satisfied Fields were informed prior to the funeral of Barbara and David's existence, despite Lee Field's statement, and it is plain that no one associated with the church was so informed and had no means of learning of them.
 - v) On the evidence, if a perusal by the wardens and clergy of Francis's grave had taken place, it would not have yielded any information as to possible close family members. There was no headstone or marker that might have done so.
 - vi) I make no finding as to any alleged estrangement between Francis and Barbara, not least because it has no bearing on the case, but it seems clear there was no intention by his widow or son, that either of them, or anyone else, would be interred in Francis's grave.
 - vii) I am less than impressed with Edward's contention about the closeness of Francis (who had died in 1980) and Ida, or that Ida had put forward a Plan B, for her burial in his grave, if there could not be a new grave to accommodate her; there is only limited support for what he says from Jayne, and in my view it is all too convenient and is not credible.

viii) In my view Edward (and John) were desperate to follow their mother's desire to be buried at Cubley, and kept quiet in making the necessary arrangements so as not to do anything that might alert the church authorities, or David and Barbara, because they anticipated they would, or might, be unwilling to go along with the plan to bury Ida with Francis. There was a degree of conscious deception to conceal their existence. '*All the family were happy*', or some similar sentiment used by Edward, was plainly false, especially when Barbara and David would clearly have had the most right to express their view.

ix) I am afraid that the only conclusion I can come to, is that Edward and John concealed information about Barbara and David, in an effort to ensure their mother was buried at Cubley, when it must have seemed likely that would not be allowed unless the grave of a relative could be used. I accept the initial plan was for a new grave, and the fall-back idea was adopted only after 24th April when that was found not to be agreed by Jane and the wardens.

44) It is unfortunate that none of the clergy, for understandable reasons relating to health or absence, were involved personally with Edward or John about the funeral, but everything was done through Fields. The latter (understandably) were anxious to accommodate their clients' wishes and seem to have raised no enquiries as to who might have something to say about the proposed burial in the deceased's brother's grave, but accepted the brothers' assurances to the effect that everyone was happy. I am sure that if this had been a burial of someone from the village or on the electoral roll, there would have been direct contact by a member of the clergy with the deceased's family. However, it is not certain that even direct contact with Edward or John by a member of the clergy, would have led to the existence of Barbara or David emerging, in view of Edward and John's desire to make this last effort to ensure Ida's burial at Cubley. They were not naive, or distracted, or emotionally beside themselves, but kept quiet about relevant matters. I do not accept Edward thought everyone had been contacted who should have been. How could Fields have learned of Barbara and David, unless he informed the firm of their existence?

45) In my view Barbara and David have a well justified sense of grievance that they were not informed of the plan to bury in Francis's grave and given an opportunity to express their views. However I do not consider the legal position depends solely on this finding, or leads inevitably to the Order for exhumation now sought.

Legal issues

46) As I explained before in my original Note, a churchyard is not open to anyone who wishes to be buried there (assuming of course it has not previously been formally closed for burials, and there is still sufficient space remaining). The categories of those with a 'right' to burial are, first, parishioners, and second, those who may not be parishioners but who have their names on the church's electoral roll, and thirdly, the rare category of those in neither of the other two groups, who happen to die in the parish, through illness or accident. In addition the minister may allow others to be buried at his or her discretion - and there is no appeal available against a refusal to grant permission - subject to any general guidance on the matter given by the PCC (see section 88(4) and(5)) of the **Ecclesiastical Jurisdiction and Care of Churches Measure 2018**, re-enacting earlier legislation from 1976). The PCC has an interest in safeguarding the churchyard for those with a 'right' of burial and, in framing any guidance, may be assumed to know the needs and circumstances of their parish.

47) In this case, unusually, we have comprehensive *Guidelines* approved by the PCC back in 2001, which include some greater clarity on the relevant categories, such, for instance, as to provide an answer to the question: what happens if a parishioner moves outside the parish into a retirement home or for hospital care? The *Guidelines* include, in my view, the sort of general guidance envisaged by section 88. I am satisfied that Ida no longer had a right of burial, as once she had when still a parishioner, having lived away from Cubley for 14 or so years; this was no short-term or temporary period for support or care. Jane and the wardens were alive to the issue whether there was a right of burial and were assuredly correct in deciding there was not. The only basis to allow Ida's burial, was under the final category, and that was only acceptable to them, if no new space were used. The idea of a burial in a relative's grave came from Ida's close family, via Fields, and on the assertion that all members of her family were content with that course, it was approved by Jane and the wardens. That assertion was in my view not only inaccurate and wrong, but was known to Edward and his brother to be so - no one had alerted Barbara and David to the proposal, and no one had alerted Fields or the parish to their existence.

48) However, the priest temporarily in charge, (Jane), and wardens had given their consent to Ida's burial, in line with the *Guidelines*, and on that basis the burial went ahead. **In my judgment that consent was**

effective - it was not void or a nullity, though possibly it was voidable, i.e. it could be set aside *by the clergy* on the basis of the mistake or misrepresentation about David and Barbara caused by Edward and his brother's silence on the matter. They have not sought to do that, and after the burial had taken place, it may not have been possible, in any event. I stress that I am not faced with deciding any issue on the basis that *before* the funeral actually took place, Jane and the wardens had discovered the effective deception that had taken place, and that Barbara and David did indeed object, and therefore sought to withdraw the consent that had been given). ***The fact the clergy and wardens had been kept in the dark, does not, in my view, give any right or remedy to David or Barbara, to obtain an order for exhumation.***

- 49) David, of course, also makes a number of other assertions, which are based on the idea, this was *their* grave, they had exclusive burial rights in it (which seem to include a right to be consulted about another burial in the plot, and also an absolute right to prevent that occurring) and that a burial there without their permission was illegal - assertions he has continued to make in various ways. I have to try and address this argument.
- 50) As I have said in my Note, 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. There was no reservation here relating to Francis's grave, which could be said to set aside that grave for his, or anyone else's, exclusive use.
- 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.
- 54) In my view, the fact Francis is buried there, does not give to Barbara or David any entitlement, exclusive or otherwise, to be buried there, and indeed they make clear neither would seek burial in the deliberately chosen 'single' grave. ***They themselves have no 'exclusive' rights in regard to Francis's grave.*** In my view, they do not have an absolute power to dictate how Francis's grave space is to be used in the future or to determine if any further burial in it is to be allowed. What then is their position and status, assuming they have one?
- 55) I believe, although I have found no express authority or guidance to the effect, in the Church of England's *Guide to the Professional Conduct of the Clergy*, or elsewhere, that the clergy would be astute to pick up on any hints of a dispute about a proposed burial, when meeting with the family to discuss the details of the funeral, or through other channels, but in practice they would not be likely to go ahead if there were apparently well founded or strongly held objections to a particular course, such as there is here.

- 56) Most individuals in the general population, whether churchgoers or not, would, I believe, take the same view David and Barbara have, namely, that they have, at least, a real expectation they will be consulted about proposals such as these, involving the grave of a very close relative, and that their objections will, at the least, be carefully listened to. The clergy would not only seek to avoid further upset or conflict at a time when grief or other emotions may already be profound, but will also recognise that placing themselves, or being perceived, as supporters of ‘one’ side or other in a family dispute, will make their role in giving comfort and pastoral support, or acting as peacemakers, very difficult. ***However I am satisfied that the ‘expectation’ I have referred to is not a legal right, or that a failure to be consulted gives any remedy against the clergy or anyone else, to David and Barbara.***
- 57) Here we know, for reasons I have outlined, in the particular circumstances, the clergy were not alerted to, and did not pick up on the fact David and Barbara had not been consulted. David undoubtedly blames the church and its clergy for that being the case, and sees it as a breach of proper procedures and protocols. What then is the duty of the clergy in dealing with a grieving family, to make enquiries such as might have alerted them in this case to David and Barbara’s interests in what was in fact being planned?
- 58) I have not found much help in the many reported decisions of the church courts relating to exhumation, but I have been alerted to a decision which is of some assistance. (I am grateful to Chancellor Collier QC for help in tracking this down.) It can be found on the Ecclesiastical Law Association website. ***In the Matter of St Mary’s Polstead*** [2017] ECC SEI 2 (in the Diocese of St Edmundsbury and Ipswich), a decision of Chancellor Etherington QC, 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. Members of the next generation had also taken sides on the matter, including a grandson, Robert, the son of the surviving daughter. The many areas of dispute were further complicated because family members now lived in different places all over the world. Arrangements for the interment of Joyce’s cremated remains were made through the parish administrator as, at the material time, there was no stipendiary priest in post, but Robert had notified his objection to the proposed interment. The difficulty was referred to the priest who was to take the service, who took advice from the Rural Dean. The latter’s response was (in my view) wrong, but in any event was ambiguous, to the effect: *‘It was a matter for the next of kin’*, but what did that mean? Was it Joyce’s next of kin, or the grandparents’? The officiating minister seemed to favour the first of those and took the view Robert’s objection had been overruled by the Rural Dean, and the interment went ahead, without, by mistake, Robert even being informed of the view taken and therefore not being in a position to do anything about it. At para 16 of his judgment, the Chancellor noted that among the issues to be resolved, were those *‘as to what the clergy should have done in this situation’* (of a family dispute) *‘what they did do and why?’*
- 59) At paragraph 22, he addressed these questions by saying:
‘.....it behoved the incumbent or anyone acting on behalf of the incumbent, either to satisfy him or ...herself that (Joyce’s daughter) had established all relevant next of kin had been contacted and either did not object, or did not require (her) by way of the faculty process to petition this court for that permission. The relevant next of kin were not just those of the deceased (Joyce) but particularly those of the deceased (grandparents) in whose plot it was proposed to inter the remains of Joyce.
23. In this case, all parties were aware of Robert’s objections, which should have alerted the clergy to make proper inquiry.....
24. This was in fact a situation involving a potential objection by the next of kin of (the grandparents). Full details of family members should have been sought and the precise nature of the objections ascertained’.
- 60) The Chancellor acquitted everyone of acting in a deceitful or underhand way, but criticised them for failing to see there were legal questions involved which needed to be resolved, of failing to see the obvious ambiguity in the Rural Dean’s advice, and for dealing with the matter in an unstructured way, without proper allocation of responsibilities. He considered Joyce’s daughter should have applied for a faculty to permit interment of her mother’s ashes, so the matter could have been determined in the proper way. In the end, as Joyce’s remains had been interred in fact, should they be exhumed? Having regard to the fact that the various objectors had, through no fault of fault of their own, been denied an opportunity to advance their objections, in his discretion, after reviewing the authorities, he granted the exhumation sought. He considered the clergy had failed to deal with a known objection in a proper way, and failed to have regard to the known objector’s views on a correct basis. This case therefore has some similarities with the situation at Cubley, where Barbara and David were denied the opportunity to put forward their objections, which I fully accept they have made known from the earliest point at which they became aware of the fact of Ida’s burial in Francis’s grave. Should their circumstances also lead to an order for exhumation?

Comment

- 61) Let me first set out some general comments on the **Polstead** decision. I am far from suggesting the Court reached the wrong conclusion on the facts of what was a difficult and distressing case, but I am troubled by three matters in particular: *first*, the far-reaching responsibility being placed on the clergy to make what could be widespread enquiries to ensure that all 'relevant' members of an extended family in dispute with one another had been contacted, and had reached agreement as to the way forward, or, to track down those who might have objections and ascertain what those were, and require a petition to be presented.
- 62) It is not simply the amount of work that might be involved, but that the collection of names of individuals and their various objections would not obviously lead to some compromise among them all, so the proposed burial or interment would go ahead. I think this exercise lies well outside the accepted role of the clergy in offering pastoral support and comfort at such a time, or indeed their expertise. Some would doubtless do it well and thoroughly, others would struggle and not know how to proceed. If the clergy fail to enquire thoroughly, what, if any, consequences, including claims for legal redress, might follow? How many people should be allowed a say, and are there limits on their relationship to the deceased, beyond which there is a cut-off point? I am anxious that the limits of the priest's responsibilities are not expanded in a situation like this, rather than leaving them simply to decline to proceed with a burial where he or she is aware of unresolved issues among family members, and urging those with whom there is contact, to seek compromise, or, failing that, that they seek their own appropriate legal advice. Clergy should not, in my judgment, be turned into enquiry agents.
- 63) *Second*, in such cases, resorting to the Chancellor for any necessary ruling, is necessarily likely to be a rather slow and potentially expensive process, with the proper enquiries and statements being needed, and to be well outside the time frame required by the family in that situation. That might possibly not be so pressing a consideration, in the case of cremated remains as when burial of a body is sought. I appreciate of course, that privately sought legal advice will not make things proceed more quickly. There is much to be said for the next of kin approaching the priest for him or her to make any necessary decision, but I appreciate that will not necessarily be a simple solution.
- 64) *Third*, 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.
- 65) The **Polstead** judgment does at least seek to grapple with a situation where it is known there is a family dispute about a burial, and the responsibilities of the clergy.
- 66) The situation with Ida's funeral is, in any event, very different. Unlike the **Polstead** case, the clergy and wardens were not aware of the potential objection from Barbara and David, of whom they knew nothing; insofar as there had been concealment, they too were victims. As I have pointed out already, there was nothing on Francis's grave, if it had been inspected, to alert the priest or wardens to the existence of either individual. Jane and the wardens were simply seeking to assist a family (Edward and John and others) at a difficult time, as they would have seen it, and should not be expected to undertake enquiries beyond what might in fact emerge through any 'ordinary' pastoral contacts with them.
- 67) It is *implicit*, in my view, in paragraph 12.12 of the *Guidelines for the Professional Conduct of the Clergy*, that in exercising their responsibilities in regard to their duty to officiate at the funerals of parishioners or those on the electoral roll, under Canon B38, that contact *will* be made with a member or members of the deceased's family, and it is required the clergy should ensure appropriate care for them, which would surely include being alive to and responding appropriately to any potential family dispute. For the various reasons I have described, no contact with the Ida's family took place in this case, (and was not mandated under the paragraph or Canon). Even if it had been made, Barbara and David's interest in the proposed course of action might not have emerged. Nonetheless these *Guidelines* surely point to the wisdom of making contact with relatives, even in a case like this, where the deceased is from outside the parish and the family are unknown to the priest.
- 68) In his recent decision **In re St Oswald, Filey [2019] ECC Yor 8**, Chancellor Collier QC was faced with a question relating to a churchyard that had been closed for burial. Despite the clearest instruction from

the parish priest that a proposed burial of a body in the closed churchyard could not and must not take place, the funeral director managed to find a narrow space between two existing graves and had the body interred. (I understand the parish priest was away at the time, and I do not know what arrangements for a service, if any, were made.) This burial was not only prohibited by the parish priest, but was also a criminal offence and illegal, because the churchyard was closed. The circumstances were referred to the Chancellor for him to investigate and rule on. There was no petition for exhumation. The burial was not something that could even be allowed on a discretionary basis in the closed churchyard. Having considered all the circumstances, the Chancellor declined to require any petition for exhumation to be presented, or to refer the matter to the police for further investigation or possible prosecution. An undoubtedly illegal burial - a much stronger case than the one at Cubley - did not result in steps being taken to remove the unlawfully buried body. Even in these extreme circumstances, exhumation remained a matter of discretion.

- 69) I note that neither David nor Barbara has been deprived of the possibility of their own burial in Francis's grave. The burial of Ida's body was in exercise of a discretionary power vested in the priest looking after the parish, under section 88, to allow the burial of someone with no right of burial in the churchyard, and in the general power to approve or direct whereabouts in the churchyard, the burial of the deceased should be. The burial in Francis's grave took place as a result of consent by Jane and she was entitled to make that decision. It was effective. I am entirely satisfied the clergy and wardens acted correctly and cannot properly be criticised.
- 70) The Registrar has recently received a letter from the petitioner, **David**, for my attention, the contents of which she has sent to me. It concerns a cousin named as **Melanie Hodgkinson** and presumably someone different therefore from the cousin Melanie referred to in paragraph 37 above. This Melanie is the daughter of the late Clifford Redfern, one of the twelve siblings, who is also buried at Cubley. David says that Melanie asserts that Ida's family had been offered 'quite some time before the funeral of Ida Lewis', by Melanie and her siblings, the opportunity to have Ida interred in Clifford's grave. David seems to assume this will bear on my decision in some way, possibly by making clear that an exhumation would not mean that Ida's remains would not be able to be buried at Cubley - she could be buried with Clifford, with the goodwill of his children, rather than being in Francis's grave where her presence is unwelcome to David and Barbara.
- 71) This information comes to me very late in the day, 10 months or so after the present issue first surfaced. It seems to me that further investigation might not confirm the situation as David contends it is. Without an application from Ida's family with supporting evidence from Clifford's relatives, the issues I have to resolve remain the same, and centre round whether David has a proper basis to seek an exhumation.

Conclusion

- 72) In my view David has **not established any basis sufficient in law based on any property right analogous to a reservation, or otherwise**, to support his petition for exhumation, despite his readily understood contention he and his mother should have had an opportunity to express their objections to Ida's burial in Francis's grave. The failure in their being alerted to the proposed burial, and having the opportunity to object, which I am satisfied they would have done, is undoubtedly, unusual and very regrettable. I am not prepared to characterise it as an exceptional circumstance within the meaning of the **Blagdon** case. Nonetheless, even if I am wrong in that conclusion and the failure should properly be so characterised, that would only be the *first* step in obtaining an order for exhumation. In other words, it could be a *necessary* step towards such an order being granted, but *not a sufficient one*. It would not be an inevitable conclusion without more. In my view, by analogy with the **Filey** case discussed above, the Chancellor still has to decide whether, in all the circumstances such an order *ought* to be made.
- 73) I return to the fact the burial was properly allowed under section 88, by the responsible minister, in accordance with the relevant guidance from the PCC. The fact Jane and the wardens were acting under a misapprehension resulting from concealment of material matters, does not in my view, give David and Barbara a potential ancillary right of some kind to have Ida's remains exhumed. That is always discretionary. There is a clear conflict between David's understandable expectation they should have been notified of what was planned, and be able to put forward objections, and the position of the Church of England that exhumation should only be allowed in exceptional circumstances. As this was a lawful burial, the latter policy prevails.
- 74) It follows that **the petition for the exhumation of Ida Lewis is dismissed.**
- 75) Although the matter has not arisen as yet, **I direct that any application for a memorial to Mrs Ida Lewis be referred to the Chancellor for directions and final decision.** It would not be right for the Rector or one of the other clergy to have to wrestle with the issue.

John W. Bullimore
Chancellor
26th March 2020