Observations on Exhumation

Philip Petchey, Chancellor of the Diocese of Southwark[1]

I will begin with the moving words used, following the funeral service, when the body of the departed is committed to the ground:

We have entrusted our brother/sister N to God's mercy,
and we now commit his/her body to the ground:
earth to earth, ashes to ashes, dust to dust:
in sure and certain hope of the resurrection to eternal life
through our Lord Jesus Christ,
who will transform our frail bodies
that they may be conformed to his glorious body,
who died, was buried, and rose again for us.
To him be glory for ever.
All *Amen.*

This is how we say goodbye to those who have died and how we begin to come to terms with the loss of a husband, wife, partner, relative or friend. It represents a letting go and marks the beginning of a moving on.

If permission to exhume were available on demand and was a frequent occurrence it would undermine the meaning and significance of the service of committal.

Moreover, setting aside any such theological/psychological/sociological justification, the respect that we feel is due to the dead militates against permission for exhumation being lightly given.

But that does not mean that it is never appropriate for it to be given.

Mistake is the obvious example. If a body is buried in the wrong grave, it will invariably be appropriate to authorise correction of the error. Usually these errors come to light soon after the burial and it is obviously much better that they are corrected speedily[2].

Another is where, if exhumation is not permitted, some important public purpose is impeded. The widening of a road is a good example but it might be the extension of a church[3].

However, what about the following circumstances[4]?

Mr and Mrs Hutchings attended St Mary's, Lymington. In 1985, Mr Hutchings died and his cremated remains were buried in the churchyard. In 1987, Mrs Hutchings started to suffer from a disabling illness and moved to Wendover to live near her daughter. She could no longer visit the grave. She petitioned for a faculty to exhume the remains of her husband so that they could be re-interred in the graveyard of St Mary's, Wendover.

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[1] These observations are of course made in a personal capacity.

[2] But even if there is a period of years before the error is discovered it will still usually be appropriate for it to be corrected.

[3] It may be possible to avoid exhumation by building the extension on piled foundations. However if a person objects to the remains of a relative being built over, it would be hard to say that those remains were not appropriately exhumed.

[4] The facts of *In Re St Mary Magdalene, Lyminster* (1990) 2 Ecc LJ 127.

The Chancellor[5] held that this was not a good enough reason.

In *In re Blagdon Cemetery*[6], the Court of Arches said that the Chancellor was correct. In that case the petitioner found it difficult to drive from Stowmarket in Suffolk to Blagdon in Somerset to visit the grave of his son. The Court said

If advancing years and deteriorating health, and change of place of residence due to this, were to be accepted as a reason for permitting exhumation then it would encourage applications on this basis. As George QC Ch pointed out in In re South London Crematorium(unreported) 27 September 1999 :

> *Most people change place of residence several times during their lives. If such petitions were regularly to be allowed, there would be a flood of similar applications, and the likelihood of some remains, and ashes, being the subject of multiple moves.*

Such a practice would make unacceptable inroads into the principle of permanence of Christian burial and needs to be firmly resisted[7].

Still less would it be appropriate to permit exhumation simply on the grounds that the family of the deceased have moved.

Thus the Consistory Court and the Court of Arches wish to support the principle of permanence of burial; and have set their face against the grant of a faculty simply on the basis of a family move. Human remains should not be regarded as portable.

This said, in what circumstances should permission be given?

The Court said in *Blagdon* that the norm is permanence and that permission for exhumation should be given only exceptionally.

Thus, the matter was left to the discretion of Chancellors, the desired restraint on exhumation operating by virtue of the fact that exceptional circumstances are not just any material circumstances but weighty ones.

However the matter was not left quite there.

As we have seen the Court said that change of residence and difficulty of visiting (even if coupled with illness) were not enough.

It also said that medical evidence would have to be *very powerful indeed* to found a petition for exhumation; the sub-text to this is that a doctor's note saying that the petitioner is having difficulty sleeping would not be enough.

It also said that change of mind was not enough.

So far, so good.

The difficulty arises because it is only very occasionally that a Chancellor is presented with a simple "portable remains" case that is, *I have moved from Brighton to Liverpool and I want to take grandma's cremated remains with me.*

The typical situation is of a tragic death, often of a child and, as yet, the inability of parents to come to terms with it. Chancellor's try very hard, in appropriate cases, to find exceptional circumstances and they are surely not wrong to do so.

Blagdon itself may be seen as an example of this.

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[5] Quintin Edwards QC.

[6] [2002] Fam 299.

[7] See paragraph 36 at p307.

Stephen Whittle lived in Ellesmere Port. Tragically, he was killed, aged 21, in an industrial accident. His parents were publicans, moving every few years from one pub to another. At the time of the accident, they were keeping a pub in Blagdon and it made sense for Stephen's body to be buried in Blagdon Cemetery. However in due course they moved on and retired to Stowmarket.

It would be possible to say that the unexpected death and the fact that Mr and Mrs Whittle did not at that time have a permanent residence might in themselves be exceptional circumstances. However, they were all known about at the time of Stephen's death.

Accordingly, in justifying its decision the Court of Arches also relied on the fact that the Whittle's were creating a family grave: the exhumation was proposed to be to a grave where, in due time, Mr and Mrs Whittle would in due time be buried.

Isn't this a "get out of jail" card? To justify moving grandma's cremated remains from Brighton to Liverpool all I have to do is to establish a family grave in Liverpool.

In *In re Peters' Petition*[8], I said that it wasn't a get out of jail card. It was a relevant matter but that if **all** you had to do was to say that you were creating a family grave[9], it would, so to speak, drive a coach and horses through the requirement for exceptional circumstances.

There are some decided cases in which heavy reliance is placed upon the family grave exception; potentially too much so. But in practice, it does not appear that the family grave exception has been deliberately **utilised** by petitioners as means of achieving the desired goal of exhumation. This may in part be because petitioners tend to be those acting in person. Their approach is to set out their justification for exhumation without any reference to the law or legal principle.

In that context, what seems to be happening is that there are more cases in which petitioners are saying that they did not know that the land was consecrated or, if they did, they did not know what the consequences of consecration were. Of course one response to these facts is to say that, of themselves, they are irrelevant. What a petitioner needs to show is whether the knowledge that the land was consecrated or of the effects of consecration would have been any difference to the decision to inter. If it would **not** have made any difference, one is looking at a change of mind case.

Of course there are cases where it would have made a difference (*I was an atheist and I would never have interred the remains in the consecrated part of the cemetery had I known that it was consecrated*), and those I would categorise as operative mistake.

But it is nonetheless difficult to resist a petition where the petitioner did not know that the land was consecrated, particular against the background of the Human Rights Act. An example is *In re Hither Green Cemetery*[10]. The grave was that of a child who had died aged five of a brain tumour. At a time of profound grief the arrangements for the burial were made by the local authority. The funeral was a humanist one. The mother of the child subsequently thought she had made a mistake and could not sleep.

In *In re Lambeth Cemetery*[11] the background was that the petitioner reasonably thought that the terms of the burial deed given to them by the local authority, they only enjoyed a right of burial for 50 years (that is, a temporary right). This was a very significant factor in granting a petition for exhumation. But the family were Taoists. It would be odd to seek to prevent a non-Christian who did not know that the land in which remains were interred was consecrated from subsequently exhuming them.

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[8] [2013] PTSR 420.

[9] Of course, it would not be enough to say that you were creating a family grave. The Chancellor would have to accept, on the evidence, a settled intention to do so. However that could readily be furnished by buying the necessary burial rights.

[10] [2018] 3 WLR 2077.

[11] [2019] ECC Swk 5.

So the cases keep coming. In *Twilley*[12], the then Deputy Chancellor of St Albans discounted the significance of ignorance of effects of consecration; the Court of Arches granted permission to appeal. However additional facts came to light and it was better for the matter to be redetermined by the Consistory Court[13]. The judgment (which is awaited) may be of some interest.

My impression (which is perhaps unsurprising) is that some Chancellors are more rigorous than others. It is also that if there is any plausible basis for finding exceptional circumstances in hard cases, the Chancellor will do so. Most cases **are** hard cases in some sense; accordingly I think that more are granted than are refused.

The existing regime involves a lot of work for Registrars (and their clerks) and Chancellors but it does maintain a balance between too much stiffness in refusing and too much easiness in allowing[14].

As clerks you are the sharp end in the sense that you have to deal with members of the public who may be very distressed and aggrieved by the fact that what they want to do costs money, requires going through a legal process and has an uncertain outcome. Suggesting that they get legal advice is unlikely to be much good because (i) lawyers cost money and (ii) not many of them know about the law of exhumation. Invariably I hear good reports of how you deal with members of the public. Your stout common sense and high interpersonal skills are particular importance in this area. It is helpful also to have a background appreciation of the law. To that end I hope this talk may have been helpful.

3 October 2019

[12] [2018] ECC STA 2.

[13] Before a different judge.

[14] To adapt the words of the Preface to the Book of Common Prayer.