

Re St Peter ad Vincula, Wisborough Green
Re Martin Broderick, deceased

Judgment

1. This petition is one of an increasing number seeking the exhumation of the remains of a relative in order that they might be reinterred elsewhere. Although the general law on exhumation was clarified not long ago in the decision of the Court of Arches in *Re Blagdon Cemetery* [2002] Fam 299, the fact that it is for the petitioner in each case to establish exceptional grounds for derogating from the doctrinal principle of the permanence of Christian burial has led to a proliferation of fact-specific applications. This case raises certain issues of general application, hence the judgment is a little fuller than might otherwise have been the case.
2. The petitioner is Mrs Mary Daughton (née Broderick) who is the sister of the late Martin Broderick. Mr Broderick died on 16 April 1973. His body was buried in the churchyard of St Peter ad Vincula, Wisborough Green on 19 April 1973 in plot number 0214. The petitioner wishes the mortal remains of Mr Broderick to be exhumed from their current resting place and reinterred in what she describes as ‘the Broderick family plot’ in consecrated ground at St Mary’s Cemetery, Abbeyfeale, County Limerick, Ireland where his parents, brothers and sister are already interred.
3. The petitioner has collated evidence demonstrating the consent of Limerick County Council to the proposed reinterment in the form of a letter from Mr Michael Griffin of Limerick County Council. She has also produced a letter from the Reverend Simon Newham, then Priest-in-Charge of Saint Peter ad Vincula and chairman of its Parochial Church Council, in which he recorded a unanimous decision of the PCC to support the petitioner’s application for a faculty for exhumation. Wisely and thoughtfully Mr Newham’s letter continued as follows:

‘The PCC voted unanimously to grant your application should all other permissions be granted. However, in so voting, serious concerns were raised with regards to this application that we wish to be noted.

‘Firstly we were concerned that in granting permission for the exhumation to proceed we were neglecting our duty of care to the original wishes of Martin’s wife for him to be buried at Wisborough Green.

‘Secondly we were concerned that in burying Martin he was committed to ‘rest in peace’. An exhumation, if granted, would represent a disturbing of this peace. The nature of the rite of burial is to say ‘farewell’ to the deceased and to commend them to the mercy and love of God in Christ to await the transformation of resurrection. There is accordingly a theological finality to burial which should not lightly be disregarded.’

4. The response of Mr Newham on behalf of the PCC is a model of clarity and pastoral sensitivity. It addresses with compassion the request for exhumation, unambiguously indicates the stance of the PCC, but properly raises the doctrinal concerns inherent in the proposal, whilst leaving the determination of the matter to this Consistory Court. This is in marked distinction to the experience of another diocese where, in similar circumstances, the team rector of the parish entered a formal objection to the petition and filed evidence in opposition: *Re St Mark Worsley Churchyard*, 31 July 2006, Manchester Cons Ct. This resulted in an unduly adversarial process and avoidable distress to the petitioners. I endorse the dignity of the PCC's response in this matter, and commend it as best practice throughout the diocese.

5. I turn then to consider this petition.

The law on exhumation

6. Any disturbance of human remains in consecrated places of burial requires the authority of a faculty. See the judgment of Wills J in *The Queen v Dr Tristram* [1898] 2 QB 371. The principles which govern the grant or refusal of any such faculty were explored in the recent decision of the Court of Arches in *Re Blagdon Cemetery* [2002] Fam 299, and is put shortly in paragraph 20 as follows:

‘permission is not, and has never been, given on demand by the consistory court. The disturbance of remains which have been placed at rest in consecrated land has only been allowed as an exception to the general presumption of permanence arising from the initial act of interment.’

Reference is made by the Court of Arches to a paper entitled ‘Theology of Burial’ of September 2001 which was prepared by the Rt Revd Christopher Hill, then Bishop of Stafford, extracts from which are quoted in the judgment including the following at paragraph 23:

‘The permanent burial of the physical body/the burial of cremated remains should be seen as a symbol of our entrusting the person to God for resurrection. We are commending the person to God, saying farewell to them (for their ‘journey’), entrusting them in peace for their ultimate destination, with us, the heavenly Jerusalem.’

7. A fuller and slightly updated version of Bishop Hill's statement was subsequently published in the *Ecclesiastical Law Journal* (2004) 7 Ecc LJ 447. Its concluding paragraph, not reproduced in *Blagdon*, reads:

‘In cases of Christian burial according to Anglican rites, prescinding from cases where there has been a mistake as to the faith of the deceased, I would argue that the intention of the rite is to say ‘farewell’ to the deceased for their ‘journey’; to commend them to the mercy and love of God in Christ; to pray that they may be in a place of refreshment, light and peace till the transformation of resurrection. Exhumation for sentiment, convenience, or to ‘hang on’ to the remains of life, would deny this Christian intention.’

8. The Court of Arches in *Blagdon* stated at paragraph 33: ‘We have concluded that there is much to be said for reverting to the straightforward principle that a faculty for exhumation will only be exceptionally granted’. This general test has been variously articulated, not least by my distinguished predecessor, Chancellor Quentin

Edwards QC, as ‘good reason’ and ‘special and exceptional grounds’. See *In Re Church Norton Churchyard* [1989] Fam 37, and *In Re St Mary the Virgin, Lyminster* (1990) 9 CCCC 1 respectively, as approved in *Blagdon* at paragraph 34. The Court of Arches in *Blagdon* continued at paragraph 35:

‘The variety of wording which has been used in judgments demonstrates the difficulty in identifying appropriate wording for a general test in what is essentially a matter of discretion. We consider that it should always be made clear that it is for the petitioner to satisfy the consistory court that there are special circumstances in his/her case which justify the making of an exception from the norm that Christian burial, that is burial of a body or cremated remains in a consecrated churchyard or consecrated part of a local authority cemetery, is final. It will then be for the chancellor to decide whether the petitioner has so satisfied him/her.’

The petitioner’s case on special circumstance

9. The original petition dated 23 March 2009 contained little detail of the case to be advanced by the petitioner. An accompanying letter dated 2 January recorded that Mr Broderick married in 1962 and lived in Pulborough with his wife, Jo. He died in an accident at the age of 35. Following his death, the petitioner remained close to his widow and regularly visited his grave. This continued after his widow re-married. She died after a short illness in September 2008 and her remains were cremated at Worthing Crematorium and interred in the Garden of Remembrance.
10. The letter speaks of the petitioner’s thoughts of her late brother ‘who lies alone in a church graveyard in Wisborough Green without family to visit him’. It requests disinterment so that Mr Broderick’s remains might be reinterred in a ‘family plot’ in his birthplace in Abbeyfeale where the petitioner resides.
11. I issued brief directions which were communicated by the registry to the petitioner by letter dated 14 April 2009 addressed to her son. The directions indicated that the petition, on its face, did not demonstrate exceptional grounds as envisaged in *Blagdon* but allowed the petitioner 28 days within which to make additional representations. A copy of the judgment in *Blagdon* was enclosed with the letter. On the petitioner’s behalf, her son sought and was granted an extension of time within which to make additional representations, and these took the form of a carefully reasoned letter dated 26 May 2009.
12. The letter has been crafted to some extent so as to fit with certain of the observations of the Court of Arches in *Blagdon*. The petitioner draws the attention of this Court to two matters which were considered to be special factors in the *Blagdon* case which, she argues, should also apply to her petition. I interpose to observe that each and every decision of the Consistory Court and of the Court of Arches or Chancery Court of York turns on its own facts and care must be exercised in comparisons to situations which are not necessarily analogous.
13. The first of the matters raised by the petitioner is what she describes as ‘the sudden, tragic and unnatural death of Martin at such a young age when he himself had not expressed a view as to where he would like to be buried’. This phrase has been lifted

almost verbatim from paragraph 37 of the judgment in *Blagdon*. It should be noted that in that case the deceased was merely 21 years of age when he died and had yet to put down any community roots of his own. Mr Broderick, on the other hand, had married, established himself in Pulborough, and lived towards his middle age. Whilst I do not in any way seek to detract the personal tragedy of the accident which befell Mr Broderick, the detail of which has not been elaborated in the petition, the facts are not comparable with those in *Blagdon* and this Court is not assisted by the misplaced analogy.

14. The second matter is really a constellation of factors: that Mr Broderick no longer has any ties or links to the community in which he is buried, that his widow is now deceased and her remains interred elsewhere, and that the passage of time since Mr Broderick's death in 1973 should not be determinative. The petitioner is correct to assert that the passage of time is not determinative, as paragraph 36(ii) of the *Blagdon* decision makes plain. However, neither of the two preceding matters can amount to special circumstances. In most if not all cases, the passing of 35 years will inevitably lead to a diminution (or extinction) of community ties. Society is increasingly mobile and spouses and other relatives will move away, age and die. Such is the nature of human existence and demography.

15. The petitioner next raises issues of Catholic Canon Law. She points to Canon 1179 of the 1983 Code of Canon Law which reads in full:

‘As a rule the funeral rites of religious or members of societies of apostolic life are to be celebrated in their own church or oratory by their superior if it is a clerical institute or society, otherwise by the chaplain.’

This canon, however, as the subheading ‘Rites for Religious’ suggests, applies only to members of religious orders, be they monks, nuns or similar. It is of no application in the case of Mr Broderick who, I understand, was a Catholic layman.

16. The petitioner also makes reference to Canon 1176 of the Code which I likewise reproduce in full:

1. The Christian faithful departed are to be given ecclesiastical funeral rites according to the norm of law;

2. Through ecclesiastical funeral rites the Church asks spiritual assistance for the departed, honours their bodies, and at the same time brings the solace of hope to the living; such rites are to be celebrated according to the norm of liturgical laws;

3. The Church earnestly recommends that the pious custom of burying the bodies of the dead be observed; it does not, however, forbid cremation unless it has been chosen for reasons which are contrary to Christian teaching.’

There is nothing in the papers before me to suggest that Mr Broderick had been desirous of a Catholic funeral but was denied it. This court proceeds on the presumption of regularity and, in the absence of evidence to the contrary, assumes the arrangements for Mr Broderick's funeral to have been carried out in good faith by his next of kin. It would appear that the petitioner was on good terms with Mr Broderick's widow and was content to visit his grave regularly after his burial, finding solace in so doing. There is no evidence before me that the ministrations of the

Catholic church were sought on behalf of Mr Broderick and refused. The course adopted seems to have met with the tacit approval of all concerned and it is only now, some 35 years later, that this apparent concern has been raised. I do not consider this decision to be analogous with that in *Re Durrington Cemetery* [2001] Fam 33, where an exhumation was permitted to allow the deceased to be reburied in a Jewish cemetery in accordance with the law and customs of the Jewish faith. There is no evidence that the burial of Mr Broderick's body in the Church of England churchyard at Wisborough Green was a mistake. On the contrary the decision was informed and deliberate and, as this court is bound to assume, accorded with the wishes of his next of kin.

17. Whatever the petitioner may think now, Mr Broderick was given a decent Christian burial and was interred in consecrated ground. My understanding of Catholic doctrine is that it mirrors that of Anglican teaching as described in Bishop Hill's paper. Burial is permanent and disturbance of human remains is discouraged. There is a risk that the proposed exhumation might itself offend Catholic doctrine and sensibilities. If the petitioner remains concerned, then it remains possible for a requiem mass to be said for Mr Broderick and for a Catholic priest to say a prayer of blessing over his grave. Whilst I cannot order these things, I am confident that the incumbent would accommodate this, mindful of the pastoral concern which he has already demonstrated in this matter.

18. The next issue raised is that of the family grave. The petitioner, though she does not identify them, indicates that the proposed reinterment would be in a family grave alongside Mr Broderick's parents and all his brothers and sisters. It is said that he has no family in England. There is an echo here of paragraph 36(vi) of the judgment of the Court of Arches in *Blagdon*. It reads:

'The concept of a family grave is, of course, of long standing. In a less mobile society in the past, when generations of a family continued to live in the same community, it was accepted practice for several members of a family to be buried in one grave ... Burials in double or treble depth graves continue to take place at the present time. They are to be encouraged. They express family unity and are environmentally friendly in demonstrating an economical use of land for burials.'

However, the Court of Arches proceeded to make the following warning at paragraph 40:

'In [allowing this appeal] it should not be assumed that whenever the possibility of a family grave is raised a petition for a faculty for exhumation will automatically be granted.'

19. I do not consider that the issues raised in this petition with regard to the family grave are persuasive, still less determinative. While the petitioner would undoubtedly derive comfort from having her brother's remains closer to hand and proximate to those of other relatives, I do not consider that this single factor can amount to a special circumstance when the surrounding facts point to a regular and uncontroversial interment which has not been subject to question or challenge for 35 years. I have regard to a similar refusal of a faculty by Chancellor McClean QC in *Re Arthur Mallinder (deceased)*, Sheffield Consistory Court, 9 January 2006.

20. Finally I come to the matters raised by the petitioner in relation to the European Convention on Human Rights. She does not refer to any legal authority or other case law but asserts that an order for exhumation would allow her to exercise her rights and freedoms under the Convention, as she puts it, ‘to apply my Catholic religious beliefs in respect of my deceased brother Martin, to visit Martin regularly and to pray for him and the rest of my family together at their family place of rest’.
21. The decision of the European Court of Human Rights in *Dödsbo v Sweden*, App No 61564/00 suggests that a restrictive approach by the state to exhumation does not amount to a violation of Article 8 of the Convention, which protects private and family life, since the interference is justified on public policy grounds. The Strasbourg Court, in its decision, gave to the national government of Sweden a wide margin of appreciation. Here, of course, I must exercise a primary jurisdiction irrespective of the margin afforded to national legislatures. That said, I do not consider there to be any violation of Article 8. The restriction on exhumation is prescribed by law and justified on the grounds of public health and public order. I have regard to the analogous arguments considered by Cranston J in *The Queen (on the application of Ghai) v Newcastle City Council* (May 2009) in relation to open air funeral pyres and Hindu practice. The fact that Mr Broderick’s remains cannot be buried alongside those of his close family relations is therefore not actionable under Article 8 of the European Convention on Human Rights.
22. There was no argument in *Dödsbo v Sweden* on the separate Article 9 issue concerning freedom of religion. I do not consider that Mr Broderick’s estate has any enforceable rights arising out of his burial in a Church of England graveyard. This was done at the behest and with the permission of his next of kin. As far as I am aware no Catholic burial was sought and, in consequence, none was refused. There is no arguable case under Article 9 in this regard. Whether the petitioner herself has a separate claim for the violation she alleges needs to be separately considered. This matter was afforded some weight (albeit *obiter*) in *Re Durrington Cemetery* [2001] Fam 33. That case concerned the conflict between Jewish and Christian practice, whereas here the issue raised is as between different denominations of the Western Christian tradition which, as best as I can see, hold to near identical teaching on the permanence of Christian burial. The inability of the petitioner ‘to visit Martin regularly and to pray for him’ arises from her geographical distance from his grave and is not the product of a supposed violation of her religious freedom as she alleges. Were he to have been buried in a Catholic cemetery in Sussex, in accordance with the liturgical norms prescribed by the Catholic Code of Canon Law, she would be in precisely the same position. There is no evidence before me to the effect that in such circumstances, Catholic Canon Law, doctrine and practice would favour the breaking open of Mr Broderick’s grave and transportation of his remains to a Catholic burial place nearer to the petitioner’s home. Indeed, my understanding is that Catholic teaching would equally militate against any disturbance of his remains.

Conclusion

23. Having considered each of the factors raised by the petitioner with the specificity

they deserve, I return to looking at the substance of her petition in the round. Put shortly, has she satisfied the Court (and I emphasise that the burden of proof is always on the petitioner) that there are special circumstances which in her case justify the making of an exception from the norm that Christian burial is final? In my judgment she has not. Indeed, she has not come close to so doing. Her motivation is understandable, and one cannot fail to feel compassionate towards her in that she is denied the comfort which she formerly derived from visiting her brother's grave. But the reality is that her reasons are not ones of Christian or, more specifically, Catholic doctrine but of sentiment. She wishes her brother's remains to be brought closer to her, and the ecclesiastical courts have consistently rejected petitions founded upon the portability of human remains.

24. It follows that the presumption in favour of the permanence of Christian burial has not been displaced and this petition must fail. Should the petitioner decide to adopt the course which I raised in paragraph 17 of this judgment then I would expect the incumbent to be generous and open in terms of ecumenical ministry and to permit both the saying of a Catholic requiem mass and the blessing of the grave by a Catholic priest. I trust that this will give comfort to the petitioner and help her to bear the disappointment at the inevitable dismissal of this petition.

The Worshipful Mark Hill QC
Chancellor

30 June 2009