

Exhumation laws are anything but dead and buried

Robert Fookes considers the law on the exhumation of remains and the exceptions to the presumption that burial in consecrated ground is final



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When advising a client about a will, the financial planning of an estate may be the greatest concern. However, recent decisions of the ecclesiastical courts suggest that advice about burial should also be considered. If left until after death, the first contact with advisers may well follow the burial and be too late. Rectifying mistaken burials may be both difficult and upsetting.

Public cemeteries usually contain consecrated and unconsecrated land; the latter is usually the larger area. Anyone may be buried in land consecrated by the Church of England. Alternatively, anyone may be buried in unconsecrated land.

Churchyards will only contain consecrated land but some parts may be closed to burials or may permit interment of ashes only.

The difference between consecrated land and unconsecrated land is that the former will be governed by the consolidating Faculty Jurisdiction Rules 2015, which take effect on 1 January 2016, and the latter by the Ministry of Justice (MoJ).

These rules will apply to any burial in consecrated land, irrespective of the faith or beliefs of the deceased.

Exhumation requires an MoJ exhumation licence (formerly a Home Office licence) unless a faculty has been granted, pursuant to section 2 of the Church of England (Miscellaneous Provisions) Measure 2014.

Exhumation from consecrated land always requires a faculty – a formal application to the consistory court of the dioceses for a grant by the chancellor of the diocese permitting exhumation.

Principle of permanence

In deciding whether or not to permit a faculty to issue, the chancellor will recognise that exhumation does not involve a question of doctrine, ritual, or ceremony, but that the normal rule is that burial in consecrated land is permanent, and that a faculty will only exceptionally be granted for exhumation. It was held in *Re Blagdon Cemetery* [2002] Fam 299 that it is for the petitioner in each case to

demonstrate that, on the balance of probabilities, there is an exception to the norm that the burial, whether in a churchyard or in the consecrated part of a cemetery, is final.

Some public cemeteries grant limited period rights of burial in consecrated ground, which is inconsistent with the principle of permanence.

While the general rule is that burial in consecrated ground is final, that is not an absolute rule, and there will be exceptions.

The mere fact that no one objects; that all close relatives are in agreement; that the incumbent, the parochial church council, and any nearby residents agree; or that there is little risk of affecting the sensibilities of congregations or neighbours are all neutral circumstances rather than special circumstances justifying an exception. Such matters do not amount to an exception, whether considered singly or together.

The Court of Arches in *Blagdon* considered a list of possible but not determinative exceptions to the strict rule and found:

- Medical or change of residence (in support);
- Lapse of time (not determinative);
- Mistake (in support);
- Local support (not determinative);
- Precedent (for or against); and
- Family grave (in support).

Possible exceptions

The retrieval of buried rings has been refused.

In 1862, the Pre-Raphaelite artist Dante Gabriel Rossetti buried a notebook of unpublished poems with his wife and muse, Elizabeth Siddal. Seven years later, a Home Office consent was obtained and the book was extracted for him from the grave, in what appears to have been the consecrated part of Highgate cemetery. No mention is made of any faculty.

The retrieval of a skull, possibly that of Shakespeare, was refused in November 2015 in *Re St Leonard Beoley* [2015] Worcester Consistory Court.

In *Re Putney Vale Cemetery* [2015] Southwark Consistory Court, a faculty was granted for the removal and reburial of a Vietnamese Buddhist in another consecrated part of the cemetery under articles 8 and 9 of the European Convention on Human Rights, to accord with the Vietnamese tradition that the eldest son of the family has to carry out the exhumation and reburial of his deceased father ten years after he is first buried.

The trend of exhuming relatives and relocating them when the family moves is rarely permitted, but transfer to a family grave may be permitted (as in *Re St Mark Fairfield* [2013] PTRS 953). **SJ**